Office-Supreme Court, U.S.
FILED
FEB 9 1981
ALEXANDER L. STEVAS,
CLERK

80-1350

No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.
Petitioner,

v.

CITY OF BOULDER, COLORADO, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THOMAS A. SEATON
35 Embarcadero Cove
Oakland, California 94606
(415) 261-4100
Counsel for Petitioner

HAROLD R. FARROW
35 Embarcadero Cove
Oakland, California 94606

Stephen M. Brett
2900 First of Denver Plaza
Denver, Colorado 80202
Of Counsel

QUESTIONS PRESENTED

1. Are home rule municipalities automatically immune from liability under the federal antitrust laws by operation of the state action doctrine?

2. Assuming *arguendo* that the acts here complained of can be properly classified as "non-proprietary" or "governmental," is Respondent City of Boulder immune from liability under the federal antitrust laws, because *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), is limited to "proprietary" conduct?

PARTIES TO THE PROCEEDING

Petitioner: Community Communications Company, Inc., a Colorado corporation and a wholly owned subsidiary of Tele-communications, Inc., a Delaware corporation (see Appendix for List of Petitioner's Affiliated Companies).

Respondents: City of Boulder, Colorado; Boulder Communications Co., a Colorado corporation; Thomas Cross; I. Jack Kerner; Michael Thompson; Donald Passalaqua; Barry Telleen; and Dennis DuBe.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR ALLOWANCE OF THE WRIT	7
I. INTRODUCTION: THE TENTH CIRCUIT'S DECISION TO CONFER BROAD ANTITRUST IMMUNITY ON LOCAL GOVERNMENTS CONFLICTS DIRECTLY WITH THE DECISIONS OF THIS COURT	7
II. THE TENTH CIRCUIT'S DECISION ERRONEOUSLY ELEVATES COLORADO HOME RULE CITIES TO THE STATUS OF STATES – PRECISELY WHAT CITY OF LAFAYETTE SOUGHT TO PREVENT	10
A. THE OPINION EQUATES HOME RULE CITIES WITH THE STATE	10
B. ATTRIBUTION OF STATE ACTION IMMUNITY TO HOME RULE MUNICIPALITIES SHATTERS THE DUAL SOVEREIGNTY OF OUR FEDERAL SYSTEM	11
C. ATTRIBUTION OF STATE ACTION IMMUNITY TO HOME RULE MUNICIPALITIES UNDERMINES THE ANTITRUST LAWS	12

III. CITY OF LAFAYETTE IS NOT LIMITED TO PROPRIETARY CONDUCT 14
A. THE CHIEF JUSTICE DOES NOT FAVOR BLANKET ANTITRUST IMMUNITY 15
B. BOULDER'S CONDUCT WAS PROPRIETARY AS THAT TERM HAS BEEN GENERALLY DEFINED 18
IV. UNDER A PROPER APPLICATION OF CITY OF LAFAYETTE, THE CITY OF BOULDER IS NOT ENTITLED TO ANTITRUST IMMUNITY IN THIS CASE 20
A. THE STATE POLICY REQUIREMENT WAS NOT SATISFIED 21
B. THE STATE MANDATE REQUIREMENT WAS NOT SATISFIED 26
CONCLUSION 30
APPENDIX A-1
Community Communications Co. v. City of Boulder, Colorado, 630 F.2d 704 (10th Cir. 1980) A-1
Community Communications Co. v. City of Boulder, Colorado, 485 F. Supp. 1036 (D. Colo. 1980) A-36
Constitutional Provisions, Statutes and Ordinances Involved A-47
Home Rule Amendment, Colo. Const. art. XX, § 6 ..... A-47
Boulder, Colo., Ordinance No. 2846 (Oct. 6, 1964) A-50
Boulder, Colo., Ordinance No. 4472 (Dec. 18, 1979) A-55
Boulder, Colo., Ordinance No. 4473 (Dec. 18, 1979) A-62

Page

Colorado Antitrust Statute, Colo. Rev. Stat. §§ 6-4-101, 6-4-102 (1974 and Supp. 1980) A-66

Municipal Powers Statute, Colo. Rev. Stat. § 31-15-702(1) (1974) A-67

Sherman Antitrust Act §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2 (1976) A-68

Supremacy Clause, U.S. Const. art. VI, cl. 2 ..... A-69

Re The Mountain States Telephone & Telegraph Co., 73 P.U.R.3d 161 (Colo. Pub. Util. Comm. 1968) A-70

List of Petitioner's Affiliated Companies A-92

TABLE OF AUTHORITIES

Cases

Beckenstein v. Hartford Electric Light Co., 479 F. Supp. 417 (D. Conn. 1979) 26

California Retail Liquor Dealer Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) ..... *passim*

Cantor v. Detroit Edison Co., 428 U.S. 579 (1976) 16, 24

Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority, 475 F. Supp. 711 (D. D.C. 1979) 26

City & County of Denver v. Mountain States Telephone & Telegraph Co., 67 Colo. 225, 184 P.604 (1919) 18

City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958) 12, 13

City of Boulder v. Community Communications Co., No. 80 CV 0198-1 (Boulder Dist. Ct. Feb. 6, 1980) 4

City of Fairfax v. Fairfax Hospital Association, 562 F.2d 280 (4th Cir. 1977), *vacated & remanded on other grounds,* 435 U.S. 992 (1978) 23

Cases *Page*

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) ..... *passim*

City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431 (5th Cir. 1977) 20

Community Communications Co. v. City of Boulder, Colorado, 485 F. Supp. 1035 (D. Colo. 1980) 5

Community Communications v. City of Boulder, Colorado, 630 F.2d 704 (10th Cir. 1980) ..... *passim*

DeLong v. City & County of Denver, 195 Colo. 27, 576 P.2d 537 (1978) 25

Denver Urban Renewal Authority v. Byrne, 9 Colo. Law. 743, ... Colo. ....., P.2d ..... (Oct. 27, 1980) 25

Duke & Co. v. Foerster, 521 F.2d 1277 (3d Cir. 1975) 21, 26

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 9, 19

Feminist Women's Health Center, Inc. v. Mohammad, 586 F.2d 530 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1980) 27

General Aircraft Corp. v. Air America, Inc., 482 F.Supp. 3 (D.D.C. 1979) 19

Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979) 28

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 9, 15, 17

Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761 (D. Mass. 1980) 21

Guthrie Aircraft, Inc. v. Genesee County, 494 F. Supp. 950 (W.D.N.Y. 1980) 21, 27, 29

Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir.), *cert. denied,* 404 U.S. 1047 (1971) 19

In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072 (N.D. Cal. 1979) 19, 23, 28

Cases	Page
Interconnect Planning Corp. v. American Telephone & Telegraph Co., 465 F. Supp. 811 (S.D.N.Y. 1978)	24
Kurek v. Pleasure Driveway & Park District of Peoria, Illinois, 557 F.2d 580 (7th Cir. 1977), *vacated & remanded*, 435 U.S. 992, *aff'd per curiam on remand*, 583 F.2d [illegible] (7th Cir.), *cert. denied*, 439 U.S. 1090 (1978)	19, 25
Manor Vail Condominium Association v. Town of Vail, [illegible] Colo. [illegible], 604 P.2d 1168 (1980)	24
Mason City Center Associates v. City of Mason City, Iowa, 468 F. Supp. 737 (N.D. Iowa 1979)	21
Mobilfone of Northeastern Pennsylvania, Inc. v. Commonwealth Telephone Co., 571 F.2d 141 (3d Cir. 1978)	21
National Food Stores, Inc. v. North Washington Street Water & Sanitation District, 163 Colo. 192, 429 P.2d 283 (1967)	20
New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978)	14
New York State Electric & Gas Corp. v. Federal Energy Regulatory Commission, No. 79-4185 (2d Cir. Sept. 30, 1980)	23
Olsen v. Smith, 195 U.S. 332 (1904)	11
Parker v. Brown, 317 U.S. 341 (1943)	*passim*
People v. Mountain States Telephone & Telegraph Co., 125 Colo. 167, 243 P.2d 297 (1952)	18, 25
Perl-Mack Enterprises Co. v. City & County of Denver, 194 Colo. 4, 568 P.2d 468 (1977)	20
Pinehurst Airlines, Inc. v. Resort Air Services, Inc., 476 F. Supp. 543 (M.D.N.C. 1979)	28, 29
Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706 (3d Cir.), *cert. denied*, 439 U.S. 966 (1978)	26

Cases *Page*

Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado, 498 F. Supp. 1205 (D. Colo. 1980) 11, 28, 29

Re Mountain States Telephone & Telegraph Co. 73 P.U.R. 3d 161 (Colo. Pub. Util. Comm. 1968) 21, 24

Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers, Local No. 150, 440 F.2d 1096 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971) 19

Shrader v. Horton, 471 F. Supp. 1236 (W.D. Va. 1979), *aff'd per curiam*, 626 F.2d 1163 (4th Cir. 1980) 26

Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority, 451 F. Supp. 157 (S.D.N.Y. 1978) 28

TV Pix, Inc. v. Taylor, 301 F. Supp. 459, (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970) 21, 24

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 9

United States v. Southwestern Cable Co., 392 U.S. 157 (1968) 25

United States v. Texas State Board of Public Accountancy, 592 F.2d 919 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1980) 27

Vela v. People, 174 Colo. 465, 484 P.2d 1204 (1971) 24

Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3456 (Dec. 23, 1980) (No. 80-930) 28

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 24 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970) 19

Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025 (N.D. Tex. 1978) 11, 27, 28, 29

Constitutional Provisions, Statutes, & Ordinances *Page*

Boulder, Colo., Ordinance No. 2846 (Oct. 6, 1964) .. 2, 4

Boulder, Colo., Ordinance No. 4472 (Dec. 18, 1979) 3, 4, 19

Boulder, Colo., Ordinance No. 4473 (Dec. 18, 1979) 4

Colorado Antitrust Statute, Colo. Rev. Stat. §§ 6-4-101, 6-4-102 (1974 and Supp. 1979) 21, 28

Home Rule Amendment, Colo. Const. art. XX, § 6 *passim*

Kan. Stat. §§ 15-124, 19-101 (1975 and Supp. 1979) 13

Municipal Powers Statute, Colo. Rev. Stat. § 31-15-702 (1)(a)(VI) (1974 21

N.H. Stat. Ann. §§ 49:B:1, 3, 11 (Supp. 1979) 13

N.J. Stat. Ann. § 40:42:1 (Supp. 1979) 13

N.Y. Mun. Home Rule Law (Consol. Supp. 1979) 13

Sherman Antitrust Act § 1, 26 Stat. 209, as amended, 15 U.S.C. § 1 (1976) 4

Tex. Civ. Stat. Ann. art. 46d (Vernon 1969) 13

W. Va. Code § 8-12-2 (1976) 13

Page

Periodicals

Levi, *Application of Municipal Ordinances to Special Purpose Districts and Regulated Industries: A Home Rule Approach*, 12 Urb. L. Ann. 77 (1976) 12

Note, 65 Geo. L.J. 1547 (1977) 27

The State Action Antitrust Defense for Local Governments: A State Authorization Approach, 12 Urb. Law. 315 (1980) 25, 25, 27

Thomas, *City of Lafayette's State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities*, 1980 Ariz. St. L.J. 345 (1980) 29

Vanlandingham, *Municipal Home Rule in the United States*, 10 Wm. & Mary L. Rev. 269 (1968) 13

Other Authorities

J. Banks, Colorado Law of Cities & Counties (3d ed. 1979) 18

Colorado Municipal League, Municipal & County Officials in Colorado (1979) 12

E. McQuillin, 2 The Law of Municipal Corporations (3d ed. 1979) 12, 19, 20

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 630 F.2d 704 and appears in the Appendix herein. The opinion of the United States District Court for the District of Colorado is reported at 485 F. Supp. 1035 and also appears in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 28, 1980. A timely petition for rehearing en banc was denied by order entered October 1, 1980. This petition is filed within the period of time established by order of Justice White dated December 9, 1980. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1966).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The following constitutional provisions, statutes, and ordinances are quoted in the Appendix:

Home Rule Amendment, Colo. Const. art. XX, § 6

Boulder, Colo., Ordinance No. 2846 (Oct. 6, 1964)

Boulder, Colo., Ordinance No. 4472 (Dec. 18, 1979)

Boulder, Colo., Ordinance No. 4473 (Dec. 18, 1979)

Colorado Antitrust Statute, Colo. Rev. Stat. §§ 6-4-101, 6-4-102 (1974 & Supp. 1979)

Municipal Powers Statute, Colo. Rev. Stat. § 31-15-702(1) (1974)

Sherman Antitrust Act §§ 1, 2, 26 Stat. 209, as amended, 15 U.S.C. § 1, 2 (1976)

Supremacy Clause, U.S. Const. art. VI, cl.2

STATEMENT OF THE CASE

This antitrust case arises from the Boulder City Council's rescission of a permit granted Petitioner, Community Communications Company, Inc., to operate a cable television system throughout the City of Boulder, Colorado. The City Council granted the permit to Petitioner's pre-

decessor by Ordinance No. 2846, enacted October 6, 1964. The permit was revocable, nonexclusive, and for a twenty-year term. In consideration for the permit, the grantee agreed to pay the City of Boulder 2% of annual gross revenues. The City Council consented to the assignment of the permit to Petitioner by resolution adopted July 5, 1966.

The original purpose of the permit was to enable Boulder residents with poor off-air antenna reception of Denver television stations to receive the Denver signals by cable television. Conventional television transmission is poor in part of the city due to Boulder's location at the foothills of the Rocky Mountains. Petitioner restricted cable television service to the area of poor antenna reception, a neighborhood comprising about 20% of Boulder's residential units, since the remainder of Boulder's residents had no demand for Petitioner's service.

Cable television technology improved dramatically in 1978 and 1979. In addition to the retransmission of television signals, reception of a variety of non-broadcast programming material became practical via satellite technology. Because of the availability of this new programming, Petitioner believed that there would be a demand for cable television service city-wide. On May 9, 1979, Petitioner notified the City Council of its intent to expand both programming and the physical area served. In reliance upon the City Council's favorable response,[1] Petitioner spent approximately $900,000 on facilities, supplies, and labor.

On July 1, 1979, Boulder Communications Company [hereinafter BCC], a newly formed business organized by six Boulder citizens, requested a permit from the City

[1] In a letter to Petitioner dated May 25, 1979, the City Council's designated cable coordinator and Director of Media and Programming of the Boulder Public Library, Mr. Richard Varnes, expressed great pleasure with Petitioner's decision to expand service.

Council to compete with Petitioner for cable television customers city-wide. Since Petitioner's permit was nonexclusive, the City Council was legally able to grant another permit. Moreover, Mountain States Telephone & Telegraph Company and the Public Service Company of Colorado, joint owners of the utility poles upon which Petitioner's cable was strung, informed City Council that the utility poles could accommodate additional cables. The cable television consultant to the City Council advised that cable television service was not a natural monopoly and that competitive service was feasible.[2] Furthermore, Petitioner expressly declared its willingness to compete with BCC. Despite the absence of legal, physical, and economic constraints, the City Council declined to issue BCC a permit.

Between July 1979 and December 1979, representatives of BCC and the City of Boulder held a number of meetings. Initially, BCC asked the city to issue a second nonexclusive permit to provide cable television service. Later, however, BCC urged the city to revoke Petitioner's permit and award BCC the sole permit.

By memorandum dated December 8, 1979, the City Attorney advised the City Council that Petitioner was complying with the license contract and that unilateral revocation of Petitioner's license would be illegal. The City Attorney urged a contractual method to rescind Petitioner's permit: the adoption of ordinances imposing a moratorium on Petitioner's expansion and providing that continued service by Petitioner in the area then served would signify Petitioner's acceptance. 630 F.2d 704, 715 (Markey, C. J., dissenting.)

The City Council enacted two ordinances on December 18, 1979. Ordinance No. 4472 repealed Ordinance No.

---

[2]The city's cable television consultant, Mr. Robert Sample, former Director of Media and Programming of the Boulder Public Library, advised the City Council on July 31, 1979: "[I]f there are a couple of franchise holders, they may overbuild the other and compete for service."

2846, which had granted Petitioner the permit to provide city-wide cable television service, and reenacted Ordinance No. 2846 subject to a 90-day moratorium on construction. Ordinance No. 4473 declared the situation an emergency, *i.e.*, threatening the public health and safety of the community, so that Ordinance No. 4472 could be implemented immediately. The putative purpose of the moratorium was to freeze the status quo so that potential competitors might "catch up" with Petitioner.[3]

On January 15, 1980, Petitioner filed a complaint in the United States District Court for the District of Colorado seeking an injunction against the enforcement of Ordinance Nos. 4472 and 4473, on grounds that they violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), as well as other state and federal laws. During the pendency of the federal action, Petitioner continued its construction program and on February 4, 1980, the city filed a state court action in the Boulder District Court seeking to enjoin Petitioner from stringing new cable. The state court denied the city's requested injunction on February 6, 1980. *City of Boulder v. Community Communications Co.*, No. 80 CV 0198-1 (Boulder Dist. Ct. Feb. 6, 1980).

The city then resorted to self-help: civil and criminal citations were issued to Petitioner's cable-stringers, and on February 11, 1980, the City Manager ordered city employees to dismantle Petitioner's newly strung cable. By February 14, 1980, 6,350 feet of Petitioner's cable had been

[3] Shortly after enactment of the ordinances, the City Council issued a request for bids from other cable companies. The City Council also promulgated a model cable television ordinance, the terms of which reflected an increasingly proprietary interest in cable television: the city would have the unconditional right to purchase the cable television system at a price excluding goodwill and limited to depreciated capital investment; the city would retain the right of prior approval of every contract negotiated by the cable television company, including contracts on program content; and, in consideration for the permit, the cable television company would pay the city 5% of its annual gross revenues.

destroyed. Thereafter, Petitioner ceased cable construction and, on February 22, 1980, filed a motion for preliminary injunctive relief.

In considering the antitrust claim, the trial court focused on the immunity question. The court believed that antitrust liability would not apply to a home rule city's actions which were local, governmental (as opposed to proprietary), and properly within the authority granted it by Article XX (the home rule provision) of the Colorado Constitution. After expressing some doubt that the City of Boulder had the authority claimed over cable television, the court held that even if such authority existed, the use of that authority to impose the terms and conditions of a model ordinance requiring prescribed forms of media service is not a typically governmental type of action which would entitle it to immunity. 485 F. Supp. at 1039.

On March 17, 1980, the United States District Court, granted Petitioner a preliminary injunction and entered the following order:

> [T]hat so long as the plaintiff, Community Communications Company, Inc., operates within the terms and conditions of Ordinance No. 2846, enacted October 6, 1964, the City of Boulder and all of its officers agents, servants, employees, and attorneys are enjoined from taking any unilateral action to restrict, limit, or revoke the authority of the plaintiff to conduct its cable television business in the City of Boulder.

485 F. Supp. 1035, 1041.

The United States Court of Appeals for the Tenth Circuit in a split decision entered May 28, 1980, reversed the District Court, holding that the City of Boulder was immune from Petitioner's antitrust claim. The Court of Appeals first distinguished *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the landmark case addressing the application of *Parker* state action immunity

to municipalities, as a case applicable only to the proprietary conduct of municipalities. The conduct of the City of Boulder was classified as non-proprietary. The Court then concluded that since Colorado home rule cities were sovereign in matters of local concern, they should be accorded deference as states in applying the antitrust laws to their conduct. Finding that cable television was a matter of purely local concern, the Court held that the Boulder ordinances contained the requisite expression of state policy to displace competition and, in enforcing the ordinances, the City had met the requirement of active supervision set forth in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

"[C]ompelled by a conviction that the judgment below was eminently sound and unequivocally correct," 630 F.2d at 709, Judge Markey, Chief Judge of the United States Court of Customs and Patent Appeals, sitting by designation, filed a vigorous dissenting opinion on July 1, 1980. In his view:

> Colorado home rule cities do not have antitrust immunity under *City of Lafayette* standards. No state policy whatsoever exists in relation to cable TV . . . . With no policy whatever on regulation of cable TV, by cities or otherwise, it can hardly be said that Colorado has a state policy "to displace competition" in cable TV with regulation or monopoly public service. Much less can it be said that Colorado has a comprehensive, clearly articulated, affirmatively expressed, and actively state supervised anticompetitive policy for cable TV.

630 F.2d at 717.

Pursuant to Rule 35, F.R.A.P., Petitioner submitted a petition for rehearing en banc on June 25, 1980. By order October 1, 1980, the petition was denied.

REASONS FOR ALLOWANCE OF THE WRIT

I. Introduction: The Tenth Circuit's Decision To Confer Broad Antitrust Immunity On Local Governments Conflicts Directly With The Decisions Of This Court.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), this Court held that the immunity conferred by *Parker v. Brown*, 317 U.S. 341 (1943), was not automatically applicable to local governmental units:

> [T]he Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign or by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service . . .

435 U.S. at 413.

> [A]n adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

Id. at 415 (citation omitted).

In the language preceding this holding, the majority noted the presumption against repeal by implication of the antitrust laws, *Id.* at 399, and explained why that presumption should apply to local government:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive policy [of competition] Congress established.

Id. at 408.

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them.

Id. at 412.

> In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's goals reflected in the antitrust laws, [citation] we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach.

Id. at 413.

> When cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State.

Id. at 414.

In four and one-half pages a Tenth Circuit panel has all but obliterated the plurality's holding, permitting the triumph of the parochial economic interests which *City of Lafayette* sought to restrain. After narrowly reading *City of Lafayette* as only including proprietary conduct within its compass, the Tenth Circuit found that the broad mandate over matters of local concern given Colorado home rule cities by the Colorado Constitution transformed such cities into the State when acting on local matters. Therefore, reasoned the majority, whenever a home rule city's conduct reflects *its own municipal* policy to displace competition, and is coupled with *city* supervision of the challenged conduct, the home rule municipality escapes liability under the test set forth in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980):

> We conclude that *City of Lafayette* is not applicable to a situation wherein the governmental entity is asserting a governmental rather than a proprietary interest, and that instead the *Parker-Midcal* doctrine is applicable to exempt the City from antitrust liability.

630 F.2d at 708.

By limiting *City of Lafayette* to proprietary conduct, the Tenth Circuit's opinion ignores Justice Brennan's plurality opinion which made no such distinction between governmental and proprietary conduct, and reads too much into the concurrence of the Chief Justice whose record opposing blanket antitrust immunity is well known. *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). It compounds this error by limiting the term proprietary to governmental operation or ownership of a business, a definition at odds with settled precepts of municipal law, Colorado state law and federal court decisions defining proprietary in the related *Noerr-Pennington*[4] context.

By totally immunizing Colorado home rule cities from the reach of the Sherman Act, the Tenth Circuit has effectively overruled *City of Lafayette*. Under the Tenth Circuit's test, the judicial inquiry will focus on whether a *municipal* policy, actively supervised by the *home rule city* itself, exists to displace competition. In fact, under the Tenth Circuit's holding, home rule cities will henceforth be treated as sovereigns, directly counter to *City of Lafayette's* mandate; every Colorado home rule city, each possessing the same status under state law, will be free to announce its own policy to govern competition, the very result which *City of Lafayette* sought to avoid. Thus, the concept of dual sovereignty underlying *Parker* is undermined as a new category of entities enjoying blanket immunity is created.

---

[4]*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

II. The Tenth Circuit's Decision Erroneously Elevates Colorado Home Rule Cities To The Status Of States – Precisely What City Of Lafayette Sought To Prevent.

A. THE OPINION EQUATES HOME RULE CITIES WITH THE STATE.

The Tenth Circuit's treatment of Boulder as a state is evidenced by its application of the test from *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, a case involving not a muncipality but a state agency. The court reasoned that Boulder's home rule status converted municipal action into state action:

> The [state] policy was affirmatively expressed through the language of the [municipal] ordinances. The second part of the *California Retail* test was met by the active supervision and enforcement of the policy by [the City of Boulder's] imposition of the 90-day moratorium on construction and by issuance of civil and then criminal citations to cable workers when the moratorium was ignored.

630 F.2d at 708.

Of course, given this test, all home rule cities, not just Colorado home rule cities, will usually find themselves immune. The structure of cities is such that their anticompetitive conduct will usually be a reflection of municipal policy and will be actively supervised by the City.

Let there be no doubt: the decision of the Tenth Circuit elevates home rule cities acting in local matters to the status of states. Lest petitioner's characterization of the decision be considered hyperbolic, the following language from a decision of the United States District Court for the District of Colorado following The Tenth Circuit's opinion is cited to the Court:

> [M]unicipal policy exercised by a Home Rule

> City in Colorado is the equivalent of "state action" when exercised in connection with local affairs.

Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado, 498 F. Supp. 1205, 1210 (D. Colo. 1980).

B. ATTRIBUTION OF STATE ACTION IMMUNITY TO HOME RULE MUNICIPALITIES SHATTERS THE DUAL SOVEREIGNTY OF OUR FEDERAL SYSTEM.

The quintessence of federalism is dual sovereignty of the state and national governments. The purpose of the *Parker* state action exemption is to prevent the federal government from undue encroachment upon *state* sovereignty. 317 U.S. at 350-51; *see Olsen v. Smith*, 195 U.S. 332, 344 (1904). "Government activity should be exempt from the antitrust laws, then, only if their application would 'severely impinge' upon the system of federalism." *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1028 (N.D. Tex. 1978).

As this Court has recognized, however: "[C]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *City of Lafayette*, 435 U.S. at 412 (plurality opinion). It matters not that cities have home rule status. "However 'sovereign' home rule cities . . . may be [under state law], they nonetheless carry the status of municipalities so far as federalism is concerned." *Woolen v. Surtram Taxicabs, Inc.*, 461 F. Supp. 1025, 1032 (N.D. Tex. 1978). The Tenth Circuit's exaltation of home rule cities to sovereignty is, moreover, particularly anomalous, given the following declaration by the Supreme Court of Colorado:

> The United States Constitution provides for a national government with a federal system of *States*. All powers not expressly granted the fed-

> eral government are reserved to the *states or to the people*. United States Constitution, Tenth Amendment. Colorado's Enabling Act, approved by the federal government when we acquired statehood, insured that our state will have a republican form of government. Enabling Act, S 4. Clearly our federal system does not envisage as a part thereof city-states.

City & County of Denver v. Sweet, 138 Colo. 41, 48, 329 P.2d 441, 444-45 (1958) (emphasis in original).

The leading treatise on municipal law supports this statement of Colorado law: "[A] municipality adopting a home rule charter does not become an independent sovereignty." 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 9.08a, at 638. (3d ed. 1979) (citations omitted).

C. ATTRIBUTION OF STATE ACTION IMMUNITY TO HOME RULE MUNICIPALITIES UNDERMINES THE ANTITRUST LAWS.

The attribution of state action immunity to home rule municipalities would effectively clothe hundreds of municipalities across the county with immunity from the antitrust laws. There are 55 home rule cities in Colorado alone. *See* Colorado Municipal League, MUNICIPAL AND COUNTY OFFICIALS IN COLORADO (1979). The Colorado Home Rule Amendment is not unique. At least forty state constitutions include home rule provisions. Levi, *Application of Municipal Ordinances to Special Purpose Districts and Regulated Industries: A Home Rule Approach*, 12 URB.L. ANN. 77, 78 n.4 (1976). Although differences exist

among the home rule provisions of state constitutions,[5] each grants municipalities autonomy over local affairs. Such local autonomy was the basis for the Tenth Circuit's decision. 630 F.2d at 708.

The impact of blanket antitrust immunity for home rule municipalities would be profound. As this Court has warned:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.

---

[5] Constitutional home rule provisions are either self-executing, mandatory, or permissive. A self-executing provision authorizes a municipality to enact a home rule charter and exercise home rule powers, without state enabling legislation. A mandatory provision differs from a self-executing provision only in that state legislatures are directed to adopt enabling legislation prior to municipal home rule action. A permissive provision authorizes home rule, if the state legislature, in its discretion, delegates home rule powers to municipalities. *See generally* Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 169, 178 (1968). Regardless of the nature of the constitutional provision, home rule municipalities have substantial authority to enact legislation on matters of local concern.

Six states with no constitutional home rule provisions have home rule statutes which also authorize municipal control over matters of local concern. *See* KAN. STAT. 15-124 19-101, (1975 & Supp. 1979); N.H. REV. STAT. ANN. 49:B:1, 3, 11 (Supp. 1979); N. Y. MUN. HOME RULE LAW (Consol. Supp. 1979); W. VA. CODE 8-12-2 (1976); N. J. STAT. ANN. 40:42:1 (Supp. 1979); TEX. CIV. STAT. ANN. ART. 46D (Vernon 1969). Respondent may argue that statutory home rule cities do not possess as much power as constitutional home rule cities, because the state legislature may modify the home rule grant by subsequent legislation. However, the powers of constitutional home rule cities may also be withdrawn or modified, albeit by constitutional amendment rather than legislative fiat. *City & County of Denver v. Sweet*, 138 Colo. at 49, 329 P.2d at 445.

City of Lafayette, 435 U.S. at 408 (footnote omitted). As Jude Markey noted in dissent, the Tenth Circuit panel opinion permits "a city ordinance [to] do what 'the Constitution or laws of any State' cannot do namely [create] new immunities from the 'Supreme Law of the Land.'" 630 F.2d at 715. For example, home rule municipalities would be free to award monopolies to favored companies, by enacting an ordinance. Furthermore, recognition of state action immunity for home rule cities opens the door to immunity for subordinate divisions of the municipal government as well as other political subdivisions, such as counties and school districts.

III. City Of Lafayette Is Not Limited To Proprietary Conduct.

This Court has never declared or applied different criteria to proprietary and governmental conduct of state government entities seeking state action antitrust immunity. *City of Lafayette* established no such proprietary - governmental distinction. 630 F.2d at 718 (Markey, C.J., dissenting). Indeed, the plurality opinion in *City of Lafayette* did not even characterize the conduct of the petitioning cities as proprietary or governmental. Only the concurring opinion of the Chief Justice drew such a distinction. 435 U.S. at 422. The *City of Lafayette* dissenters expressly rejected recognition of a proprietary-governmental distinction. *Id.* at 433-34.

If there were a proprietary - governmental distinction relevant to state action immunity, the distinction would logically apply to state agencies as well as political subdivisions. However, the post-*City of Lafayette* opinions of this Court involving state agencies are silent with respect to any such distinction. *See New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978); *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* 445 U.S. 97 (1980).

The Tenth Circuit majority herein apparently believed that the consideration of the proprietary-governmental distinction by the Chief Justice demonstrated his unwillingness to *ever* impose antitrust liability on cities acting in their governmental capacity. In the Tenth Circuit's view, the dissenters and the Chief Justice, comprising a majority of the *City of Lafayette* Court, would foreclose any extension of *City of Lafayette* beyond the proprietary conduct there held subject to liability. The *City of Lafayette* dissent cannot be read as endorsing a distinction between proprietary and governmental conduct. Moreover, the Chief Justice has long been absolutely opposed to blanket antitrust immunity.

A. THE CHIEF JUSTICE DOES NOT FAVOR BLANKET ANTITRUST IMMUNITY.

Petitioner submits that the Tenth Circuit majority has read too much into the *City of Lafayette* concurrence. The Chief Justice only sought to limit the Court's consideration to the issue of "whether the Sherman Act reaches the proprietary enterprises of municipalities" 435 U.S. at 422. A brief review of recent state-action immunity opinions authored by the Chief Justice belies any intention on his part to vest municipalities with blanket immunity when acting in their non-proprietary capacity.

The first major state-action opinion following *Parker v. Brown*, 317 U.S. 341 (1943), was *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), an opinion authored by Chief Justice Burger:

> The threshold inquiry . . . is whether the activity is required by the State acting as sovereign. [citations] . . . . It is not enough that . . . . anticompetitive conduct is prompted by state action; rather anticompetitive activities must be compelled by direction of the State acting as a sovereign.

Id. at 790-91.

Thereafter, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Chief Justice authored a concurring opinion reiterating his view that "the threshold inquiry in determining if an anticompetitive activity is state action . . . is whether the activity is required by the State acting as sovereign." *Id.* at 604. He concurred with the majority's finding of liability predicated on the absence of a statewide policy in the field. *Id.* at 604-05.

In fact, the *City of Lafayette* concurrence in no way signals a retreat from Chief Justice Burger's *Goldfarb* and *Cantor* opinions. Discussing exemptions from the Sherman Act, the Chief Justice said:

> To allow the defenses asserted by the petitioners in this case would inject a wholly arbitrary variable into a "fundamental national economic policy," [citations omitted] which strongly disfavors immunity from its scope.

435 U.S. at 419-20.

This view is reflected in his criticism of the inquiry which the *City of Lafayette* plurality directed the District Court to make upon remand. After repeating his *Goldfarb* test, the Chief Justice stated:

> I would therefore remand directing the District Court to take an additional step beyond merely determining — as the plurality would — that any area of conflict between the State's regulatory policies and the federal antitrust laws was the result of a "state policy to displace competition with regulation or monopoly public service." This supplemental inquiry would consist of determining whether the implied exemption from federal law "was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary."

435 U.S. at 425-26 (citations omitted).

In a footnote to the *City of Lafayette* concurrence, the Chief Justice expressed further dissatisfaction with the plurality's test, arguing that it does not go sufficiently far to ensure that an exemption is not improperly granted. In fact, he expressed his reservations as to the sufficiency of the "contemplation" language used by the plurality. 435 U.S. at 426 n.6. Nothing in the passage suggests a *per se* immunity for governmental activity:

> While I agree with the plurality that a State may cause certain activities to be exempt from the federal antitrust laws by virtue of an articulated policy to displace competition with regulation, I would require a strong showing on the part of the defendant that the State so intended. Thus, I would not be satisfied, as the plurality and Court of Appeals apparently are, that the highest policymaking body in the State of Louisiana merely "contemplated" the activities being undertaken by the cities. See ante, at 415. I would insist, as the Court did in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that the State *compel* the anticompetitive activity. Moreover, I would have the Cities demonstrate that the exemption was not only part of a regulatory scheme to supersede competition, but that it was essential to the State's plan. Consequently, I do not disagree with the terms of the plurality's remand as such. I would simply ask for a stronger showing on the part of the Cities. I join the judgment, however, and the directions of the remand, because they represent at minimum what I believe we should demand of petitioners.

Id.

To say that the Chief Justice favors *per se* immunity for non-proprietary conduct thus does not square with his

opinions in state action cases, *City of Lafayette* in particular. In fact, his opinion demonstrates the greatest reluctance to grant any blanket immunities.

Assuming *arguendo* that the state action immunity test for municipalities does require proprietary conduct, the Tenth Circuit erred in classifying Boulder's moratorium on Petitioner's cable construction as non-proprietary. The Tenth Circuit offered no explanation for summarily classifying the conduct of the City of Boulder as governmental, rather than proprietary.

B. BOULDER'S CONDUCT WAS PROPRIETARY AS THAT TERM HAS BEEN GENERALLY DEFINED.

Under Colorado law, it is well-settled that the enactment and enforcement of municipal ordinances like those at issue here are exercises of proprietary conduct, for two reasons: (1) the ordinances involve access to the city's rights of way; and (2) the ordinances involve the procurement of a service for the citizenry. The Boulder ordinances, by their terms, revoked a prior ordinance granting Petitioner the right to use city streets and rights-of-way for stringing cable, and then granted Petitioner the same rights subject to geographical restriction.

> The granting of the right by the city to a public service corporation to use the streets of the municipality, or the granting by the General Assembly to such a corporation of the right to use the highways of the state, is the exertion of the proprietary power of the sovereign.

City & County of Denver v. Mountain States Telephone & Telegraph Co., 67 Colo. 225, 230, 184 P. 604, 607 (1919), *overruled on other grounds, People v. Mountain States Telephone & Telegraph Co.*, 125 Colo. 167, 243 P.2d 397 (1952); *see* J. BANKS, COLORADO LAW OF CITIES & COUNTIES § 2.8, at 35 (3d ed. 1979).

Moreover, a line of cases applying the *Noerr-Pennington* doctrine in the First Amendment context have held that action like Boulder's herein is proprietary.[6]

The Boulder ordinances did involve the procurement of cable television service for the local citizenry.[7] "Obtaining for a municipality and its inhabitants of water, light, or similar service involves the exercise of proprietary or business powers of the municipality and not its governmental functions . . . ." 2 E. McQuillin, The Law of

---

[6] *See, e.g., General Aircraft Corp. v. Air America, Inc.* 482 F. Supp. 3 (D.D.C. 1979) (purchase of aircraft by CIA held proprietary); *In Re Airport Car Rental Antitrust Litigation*, 474 F. Supp. 1072 (N.D. Cal. 1979) (leasing by airports of space to rental car companies held proprietary); *Kurek v. Pleasure Driveway and Park District*, 557 F.2d 580 (7th Cir. 1977), *vacated & remanded*, 435 U.S. 992, *aff'd per curiam on remand*, 583 F.2d 378 (7th Cir.), *cert. denied*, 439 U.S. 1990 (1978) (leasing of space in City golf courses to concessionaires held proprietary); *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 940-41 (D.C. Cir.), *cert. denied*, 404 U.S. 1047 (1971) (leasing football stadium by Armory Board held proprietary); *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers, Local No. 150*, 440 F.2d 1096 (9th Cir.),*cert. denied*, 404 U.S. 826 (1971) (awarding of soft-drink concession held proprietary); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 24, 31-34 (1st Cir.), *cert denied*, 400 U.S. 850 (1970) (requesting bids, soliciting specifications for public swimming pool held proprietary).

[7] The procedure followed by Boulder, as well as the substance of the conduct, evidenced proprietary character. The City Attorney advised the City Council, by memorandum dated December 8, 1979, that the city could not unilaterally revoke petitioner's license and should, therefore, enter into a new contract with petitioner. In accordance with such advice, section 12 of Ordinance No. 4472, the moratorium ordinance, provides in part: "'The grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the grantee." As Judge Markey noted in his dissent: "'The city's 'ordinances' are, in fact and intent, *contracts*, reflecting a *proprietary* interest." 630 F.2d at 719.

By the request for bid process, the City Council intended to select the "best" monopolist for the city. *Id.* at 709, 710 n.1 (Markey, C.J., dissenting).

MUNICIPAL CORPORATIONS, § 4.154, at 231 (3d ed. 1979); *accord, Perl-Mack Enterprises Co. v. City & County of Denver*, 194 Colo. 4, 9, 568 P.2d 468, 472 (1977) (city's contract with developer for sewage treatment service was proprietary); *National Food Stores, Inc. v. North Washington Street Water & Sanitation District*, 163 Colo. 192, 429 P.2d 285 (1967) (agreement by water district re provision of sewage treatment was "within the proper exercise of proprietary and business powers of a municipal corporation").

Furthermore, the model cable television ordinance, to which any prospective licensee would be contractually bound, evidenced the proprietary character of the City's acts.[6]

IV. Under A Proper Application of City of Lafayette, The City Of Boulder Is Not Entitled To Antitrust Immunity In This Case.

The Tenth Circuit should have applied the test for state action antitrust immunity for political subdivisions as exemplified by the doctrine of *City of Lafayette*. The *City of Lafayette* Court held that municipalities must satisfy two conditions in order to avail themselves of state action immunity. First, the municipality must be acting pursuant to a clearly articulated, affirmatively expressed "state policy to displace competition with regulation or monoply public service," 435 U.S. at 413. Second, the municipality must demonstrate "from the authority given . . . [the municipal government by the state legislature] to operate in a particular area, that the legislature contemplated the kind of action complained of." *Id.* at 415, *quoting City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1977).

---

[6] The ordinance included the following terms: an increase in permit price from 2% to 5% of the licensee's annual gross revenues; the city's reservation of the right to approve every contract negotiated by the licensee, including contracts on program content; and the city's unconditional right to buy out and assume control of the licensee.

A. THE STATE POLICY REQUIREMENT WAS NOT SATISFIED.

Colorado has no statutory, administrative or constitutional policy in clear, affirmative terms to displace competition in the cable television industry with regulation or monopoly public service. The most charitable characterization of state policy on competition within the cable television industry is that it is neutral.[9]

Finding no statutory[10] or administrative[11] expression of policy, the Tenth Circuit identified the 1912 Home Rule Amendment of the Colorado Constitution, COLO.

---

[9] *But see* Colorado Antitrust Statute, COLO. REV. STAT. §§ 6-4-101, 6-4-102 (1974 & Supp. 1979) which establishes a general policy of competition throughout the State of Colorado.

[10] A related statute is one granting Colorado municipalities authority to regulate municipal streets and rights-of-way, COLO. REV. STAT. § 31-15-702 (1)(a)(VI) (1974). The statute is silent on cable television and competition. Broad statutory authorization has been held inadequate to express a policy to displace competition in a particular area of the marketplace. *See, e.g., Duke & Co. v. Foerster*, 521 F.2d 1277, 1281 (3d Cir. 1975) (statutory authority to establish and operate airport, auditorium, and stadium did not express policy to boycott certain suppliers); *Grendel's Den, Inc. v. Goodwin*, 495 F. Supp. 761, 769 (D. Mass. 1980) (statute granting church and school officials veto power over liquor license applications did not express anticompetitive policy); *Guthrie Aircraft, Inc. v. Genessee County*, 494 F. Supp. 950, 956 (W.D.N.Y. 1980) (statutory authority to establish and operate airport did not express policy to revoke license of fixed base operator and grant monopoly license to competitor); *Mason City Center Associates v. City of Mason City, Iowa*, 468 F. Supp. 737, 742 (N.D. Iowa 1979) (general authority to zone did not express anticompetitive policy).

[11] The absence of an administrative policy is clear from the refusal of the Colorado Public Utilities Commission to regulate cable television systems absent legislative direction. *Re The Mountain States Telephone & Telegraph Co.*, 73 P.U.R.3d 161, 174-75 (Colo. Pub. Util. Comm. 1968). *See Mobilfone of Northeastern Pennsylvania, Inc. v. Commonwealth Telephone Co.*, 571 F.2d 141 (3d Cir. 1978); *TV Pix, Inc. v. Taylor*, 301 F. Supp. 459 (D. Nev. 1968), *aff'd per curiam*, 396 U.S. 556 (1970).

CONST. art. XX, § 6, as the basis for a state policy to eliminate competition in the cable television industry: "The [state] policy was affirmatively expressed through the language of the [municipal home rule] ordinance." 630 F.2d at 708.

The Home Rule Amendment provides, in pertinent part:

> [S]uch [home rule] city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its *local and municipal matters,* including power to legislate upon, provide, regulate, conduct and control:
>
> a. The creation and terms of municipal officers, agencies and employments . . . ;
>
> b. The creation of police courts . . . ;
>
> c. The creation of municipal courts . . . ;
>
> d. All matters pertaining to municipal elections . . . ;
>
> e. The issuance, refunding and liquidation of all kinds of municipal obligations . . . ;
>
> f. The consolidation and management of park or water districts . . . ;
>
> g. The assessment of property . . . and collection of taxes thereon . . . ;
>
> h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.
>
> It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-

> government in both *local and municipal matters* and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.
>
> The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.
>
> * * *
>
> This article shall be in all respects self-executing.

COLO. CONST. art. XX, § 6 (emphasis added).

First, the only state policy expressed by the Home Rule Amendment is that home rule municipalities shall have authority to declare *municipal* policy, i.e., policy over "local and municipal matters." Assuming *arguendo* that the regulation of the conduct of a cable television business is a "local and municipal matter" and that Boulder's conduct was a lawful exercise of municipal home rule authority, it does not follow that Boulder's conduct expresses *state* policy. "[I]t cannot be maintained that every municipal act that meets the lawful-under-state-law standard necessarily comports with any reasonably defined notion of state 'policy.'" *The State Action Antitrust Defense for Local Governments: A State Authorization Approach,* 12 URB. LAW. 325 (1980) [hereinafter cited as *a State Authorization Approach*]; *accord, City of Lafayette,* 435 U.S. at 414 n.44, 415 n.45; *New York State Electric & Gas Corp. v. Federal Energy Regulatory Commission,* No. 79-4185 (2d Cir. Sept. 30, 1980); *see City of Fairfax v. Fairfax Hospital Association,* 562 F.2d 280, 285 (4th Cir. 1977), *vacated & remanded on other grounds,* 435 U.S. 992 (1978); *In re Airport Car Rental Antitrust Litigation,*

474 F.Supp. 1072 (N.D. Cal. 1979). If lawful conduct by a home rule municipality always expressed state policy, then a home rule ordinance declaring Tuesdays and Fridays as garbage pick-up days would proclaim state policy, as would an ordinance requiring leashes on pets.[12]

Second, since the state legislature has authority to express state policy on cable television but has elected not to do so, state policy is neutral. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585 (1976). The Colorado Public Utilities Commission has acknowledged the state legislature's authority to express state policy on cable television. *Re The Mountain States Telephone & Telegraph Co.*, 73 P.U.R. 3d 161, 174-75, (Colo. Pub. Util. Comm. 1968). The state legislature has authority to express some cable television policy, because the subject is of a mixed national, state, and local concern.[13] Although no Colorado Court has had occasion to characterize cable television regulation as purely local, purely state, or mixed state and local,[14] it is clear that the mixed state and local classification would attach, given that off-air signals and microwave signals from television programs originating outside of Boulder

---

[12] Mere state acquiescence or approval is inadequate to demonstrate a clearly articulated, affirmatively expressed state policy. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585 (1976); *Interconnect Planning Corp. v. American Telephone & Telegraph Co.*, 465 F. Supp. 811, 813 (S.D.N.Y. 1978).

[13] The Tenth Circuit erroneously intimated that cable television licensing was a purely local concern. If the Tenth Circuit correctly classified cable as a purely local concern, then under state law, there could be no state policy. *See Vela v. People*, 174 Colo. 465, 484 P.2d 1204 (1971). *Manor Vail Condominium Association v. Town of Vail*, ... Colo. ...., 604 P.2d 1168 (1980), relied upon by the Tenth Circuit, did not classify cable as a purely local concern. The holding of *Manor Vail* was two-fold: (1) that the appellant, a cable television subscriber, was estopped from challenging a 1968 ordinance that set different rates for different classes of cable television subscribers, where it had known of the subscriber classification from the enactment of the ordinance, paid the charges, accepted service, and refrained from filing suit until the 1974 rate revision; and (2) that the 1974 ordinance

are transmitted across the municipal boundaries of Boulder, and are re-transmitted to Boulder residents by coaxial cable strung on utility poles belonging to an instrumentality that has been classifed as a purely state concern. *People v. Mountain States Telephone & Telegraph Co.*, 125 Colo. 167, 243 P.2d 397 (1952). Since urban blight is a subject of mixed state and local concern, *Denver Urban Renewal Authority v. Byrne*, 9 Colo. Law. 743, ... Colo. ....., ... P.2d ..... (Oct. 27, 1980), surely cable television, a telecommunications medium affecting interstate commerce, *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), is a mixed state and local concern as well.

Third, the potential variety of cable television policies among Colorado's home rule municipalities belies the expression of a state policy. *See generally A State Authorization Approach, supra* at 333. The *City of Lafayette* plurality declared that when cities are "equally free to approach a policy decision in their own way, . . . [state policy is] neutral." 435 U.S. at 414-15; *accord, Kurek v. Pleasure Driveway & Park District of Peoria, Illinois*, 557 F.2d 580, 590 (7th Cir. 1977), *vacated & remanded*, 435 U.S. 992,

---

which revised rates but maintained the practice of setting different rates for different classes of cable television subscribers did not violate the due process clause or the equal protection clause of the fourteenth amendment. Nor did *TV Pix, Inc. v. Taylor*, relied upon by the Tenth Circuit, hold the licensing of cable companies to be a purely local concern. The holding of *TV Pix* was that a Nevada statute declaring cable television a public utility subject to regulation by the Nevada Public Service Commission was not per se an unconstitutional burden on interstate commerce. 304 F. Supp. at 464.

[14] The classification of a subject as a purely local, purely state, or mixed state-local concern determines the relative authority of the state and local governments over such subject. On subjects of purely local concern, the municipal ordinance governs. On subjects of purely state concern, the state statute governs. And on subjects of mixed state-local concern, a statute and ordinance may co-exist; but if they conflict, the statute prevails. *See, e.g., DeLong v. City & County of Denver*, 195 Colo. 27, 31, 576 P.2d 537, 540 (1978).

aff'd per curiam on remand, 583 F.2d 378 (7th Cir.), *cert. denied,* 439 U.S. 1090 (1978).

B. THE STATE MANDATE REQUIREMENT WAS NOT SATISFIED.

To satisfy the state mandate test, the municipality must demonstrate "from the authority given . . . [the municipal government by the state legislature] to operate in a particular area, that the legislature contemplated the kind of action complained of." 435 U.S. at 415. Such legislative contemplation "may be demonstrated by explicit language in state statutes, or may be inferred from the nature of the powers and duties given to a particular government entity." *Duke & Co. v. Foerster,* supra, 521 F.2d at 1280.

The Colorado Legislature has never explicitly contemplated municipal restraints on cable television competition. Cable television is not among the eight enumerated powers in the Home Rule Amendment. Nor is there any explicit reference in the Home Rule Amendment to any anti-competitive municipal conduct, much less anti-competitive conduct related to cable television. *See Princeton Community Phone Book, Inc. v. Bate,* 582 F.2d 706, 717 (3d Cir.), *cert. denied,* 439 U.S. 966 (1978) (New Jersey Supreme Court rule barring attorney advertising expressly contemplated anti-competitive effect); *Shrader v. Horton,* 471 F. Supp. 1236, 1242 (W.D. Va. 1979), *aff'd per curiam,* 626 F.2d 1163 (4th Cir. 1980) (state law expressly directed mandatory water hook-up ordinance); *Beckstein v. Hartford Electric Light Co.,* 479 F. Supp. 417, 421 (D. Conn. 1979) (Connecticut Public Utilities Commission expressly orderd public utility to increase rates); *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority,* 475 F. Supp. 711, 722 (D.D.C. 1979) (Puerto Rico Legislature expressly directed monopolization of shipping trade).

Nor has the state legislature implicitly contemplated municipal restraints on cable television competition. Outside of the enumerated powers, the Home Rule Amendment is such a broad mandate that it contemplates nothing with particularity. The City of Boulder engages in *reductio ad absurdum,* if it argues that by contemplating nothing, the Home Rule Amendment contemplated all. *See* Note, 65 GEO. L. J. 1547, 1589 (1977); *A State Authorization Approach, supra* at 335. If the Court were to accept this position, state legislatures would have the authority to endow all municipalities with blanket immunity, precisely the result the Court sought to avoid in *City of Lafayette. See Woolen v. Surtran Taxicabs, Inc.,* 461 F. Supp. 1025, 1031 (N.D. Tex. 1978).

Lower courts have been unwilling to infer from such a broad mandate an intent to immunize particular acts from antitrust scrutiny. Indeed, post-*City of Lafayette* decisions have construed the state mandate test as requiring contemplation of (1) a particular kind of act and (2) the anti-competitive effects flowing from such act. *See, e.g., United States v. Texas State Board of Public Accountancy,* 592 F.2d 919, 920 (5th Cir. 1979), *cert. denied,* 444 U.S. 832 (1980) ("the connection between this granted power and the Board's use of it is too tenuous to permit the conclusion that the legislature intended its scope of activity to encompass an anti-competitive regulation"); *Feminist Women's Health Center, Inc. v. Mohammad,* 586 F.2d 530, 550 (5th Cir. 1978), *cert. denied,* 444 U.S. 924 (1980) (Director of Florida Board of Medical Examiners was not acting within the intended scope of his statutory authority by pressuring doctors to cease practice absent unethical or illegal conduct by doctors); *Guthrie Aircraft, Inc. v. Genesee County,* 494 F. Supp. 950, 956 (W.D.N.Y. 1980) (state statute granting county broad power to operate airport did not contemplate the county awarding defendant exclusive rights as

fixed base operator); *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. 543, 554 (M.D.N.C. 1979) (same holding as *Genesee County); Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority*, 541 F. Supp. 157, 166 (S.D.N.Y. 1978) ("the legislature must direct its instrumentality to engage in a particular type of anti-competitive activity"); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 482 n.10 (4th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3456 (Dec. 23, 1980) (No. 80-930) (state law assigning territories to insurers did not contemplate insurers' agreement restricting insurance coverage for psychological services to such services which are ordered, supervised, and billed by physicians).

Colorado's Home Rule Amendment contemplates neither the kind of act at issue here, revocation of cable permit by enactment of municipal ordinances, nor the anti-competitive effects of such act, geographical restriction upon and potential monopolization of the market.[15] "[T]here is no indication that the state required, or even suggested, the manner in which," *In re Airport Car Rental Litigation*, 474 F. Supp. at 1096, the home rule authority would be exercised. *See Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1035 (N.D. Tex. 1978).

In view of the incorporation of the Colorado Antitrust Statute, COLO. REV. STAT. §§ 6-4-101, 6-4-102 (1974 and Supp. 1979), into the Home Rule Amendment, Boulder's

[15] There are only two cases involving home rule cities where lower courts have found the state mandate test satisfied: *Pueblo Aircraft Service, Inc. v. City of Pueblo, Colorado*, 498 F. Supp. 1205 (D. Colo. 1980), which expressly relies upon the Court of Appeals decision in the instant case; and *Glenwillow Landfill, Inc. v. City of Akron*, 485 F. Supp. 671 (N.D. Ohio 1979). *Glenwillow Landfill* is distinguishable from the instant case, in that the state courts had construed the statutes governing solid waste disposal as authorizing municipalities to regulate "the collection and disposal of solid waste within their borders — by monopoly if the city finds it appropriate." *Id.* at 677 (citations omitted).

anticompetitive conduct was not reasonably contemplated by the amendment. State antitrust "statutes evidence a state policy to subject cities to antitrust liability and make it impossible for a city to invoke the state action exemption absent clear, specific legislation authorizing the anticompetitive municipal conduct in question." Thomas, *City of Lafayette's State Action Test Reformulated: A Meaningful Standard of Antitrust Immunity for Cities*, 1980 ARIZ. ST. L.J. 345, 380 n. 154 (1980).[16] Although the Home Rule Amendment did not expressly subject home rule municipalities to state and federal antitrust laws, like the statute at issue in *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025, 1031 (N.D. Tex. 1978),[17] the amendment did declare that "[t]he statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns. . . ." COLO. CONST. art XX, § 6. Since cable television regulation is a subject of mixed state and local concern, the Colorado Antitrust Statute is applicable.

---

[16]Broader procompetitive language than that included in the Colorado Antitrust Statute has been the basis for two decisions in which the state mandate test was not satisfied. *See Guthrie Aircraft, Inc. v. Genesee County*, 494 F. Supp. at 955-56 (statute authorizing county control of airports provided that such airports must be operated "for the general use of the public and for the benefit of such city, county, village or town"); *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F. Supp. at 554 (statute authorizing county control of airports provided that in awarding concessions, the county may not "[deprive] the public . . . of its rightful, equal, and uniform use thereof"). *But see Pueblo Aircraft Service, Inc. v. City of Boulder, Colorado*, 498 F. Supp. 1205 (D. Colo. 1980).

[17]The statute at issue in *Woolen* was the Municipal Airport Act, TEX. CIV. STAT. ANN. arts. 46d-1 to 46d-22 (Vernon 1969), which granted municipalities the authority to operate airports. Article 46d-7 (b) of the Act provided that "[n]o ordinance, resolution, rule, regulation or order by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established pursuant thereto."

CONCLUSION

The Tenth Circuit decision wreaks chaos and confusion. Against the silence of the *City of Lafayette* plurality, and Chief Justice Burger's long record of strictly construing the state-action exemption, the Tenth Circuit has immunized all cities from antitrust liability so long as the challenged conduct is governmental rather than proprietary. Against the admonition by the *City of Lafayette* majority that the parochial economic interest of cities should not be permitted to overrule the national economic policy of free competition, the Tenth Circuit held that actions of home rule municipalities were to be treated as state action and entitled to blanket immunity under *Parker v. Brown*. Henceforth, so long as actions by city departments in home rule cities reflect municipal policy to displace competition, they are presumably to be immune from the antitrust laws. The Tenth Circuit's decision cries out for review.

Wherefore, premises considered, Petitioner prays that that the Supreme Court of the United States grant the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

THOMAS A. SEATON
35 Embarcadero Cove
Oakland, California 94606
(415) 261-4100
Counsel for Petitioner

HAROLD R. FARROW
35 Embarcadero Cove
Oakland, California 94606

STEPHEN M. BRETT
2900 First of Denver Plaza
Denver, Colorado 80202
Of Counsel

APPENDIX

COMMUNITY COMMUNICATIONS COMPANY, INC.,

Plaintiff-Appellee,

v.

CITY OF BOULDER, COLORADO, et al.,

Defendants-Appelants.

No. 80-1348.

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

May 28, 1980.

Rehearing Denied October 1, 1980.

Before SETH, Chief Judge, SEYMOUR, Circuit Judge, and MARKEY, Judge*.

SETH, Chief Judge.

The plaintiff, who holds a non-exclusive franchise from the City of Boulder to engage in the cable television business in the City, brought this action against the City and another cable TV business entity. Some eleven causes of action are asserted. The complaint is directed to a City ordinance which placed a moratorium on expansion by the plaintiff in the City and to the action by the City in soliciting other cable TV business to engage in business under a proposed model ordinance. One of the causes of action asserted an antitrust violation, and this was the concern of the trial judge.

The plaintiff sought a temporary restraining order against the City to prevent its restriction on expansion. The trial court granted the order on the basis of the antitrust allegations. The defendant City has taken this appeal from the order.

---

*Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

Before this court the central issue is whether the City is exempt from the anti-trust laws.

There were two principal actions taken by the City which were considered by the trial court without really differentiating between them. One was the 90-day moratorium on expansion by the plaintiff, and the second was the model ordinance for cable television in Boulder with the solicitation of new businesses to enter the market under the proposed ordinance. The 90-day moratorium was imposed by the City by a general ordinance and by the enactment of an ordinance directed specifically to the non-exclusive franchise of plaintiff. The restraining order issued was in general terms and was directed to any unilateral action by the City to restrict or revoke the authority of plaintiff to "conduct" its business in Boulder.

The trial court combined the two elements in the following summary of what the court considered Boulder to have done:

> "Most simply stated, Boulder has attempted to restrict the lawful business of CCC by preventing it from obtaining new customers for three months while potential competitors submit proposals for serving those same customers. The motivation may be to foster competition in the long run, but the direct and immediate effect is a restraint of trade and an artificial and unreasonable geographical market allocation."

The three-month period expired one day following the entry of the restraining order so we must assume that the trial court was considering the model ordinance as a substantial and continuing factor.

Of the model ordinance and the solicitation, the court was critical of the method or the way the matter was handled. The objection thus appears to be to the way it was done and not what was done. The following quotation from the trial court's order demonstrates this aspect of

the ruling and also shows how the trial court disposed of the *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, contentions. The court of this said:

> "Assuming that Boulder does have the claimed authority to regulate cable television within the City in the manner which would be required to impose all of the terms and conditions in the draft ordinance which was submitted to the plaintiff and other cable companies, the approach taken is not an appropriate exercise and articulation of a policy of regulation. It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the final policy by exercising legislative power through an offer and acceptance mechanism. It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance has an anticompetitive effect. This is not this case. Here, upon the present record, *Parker v. Brown* is wholly inapplicable and Boulder is subject to antitrust liability under *City of Lafayette v. Louisiana Power & Light* [435 U.S. 989, 98 S.Ct. 1123, 55 L.Ed.2d 364], *supra* for the actions which it has taken."

We cannot agree that the method followed by the City somehow eliminated the *Parker v. Brown* considerations. We also cannot agree that the model ordinance with the solicitation and negotiations was somehow improper or beyond the authority of the City. This would not seem to be an issue in the case. The very same method apparently was followed by Vail in the *Manor Vail* case hereinafter considered, and the Colorado Supreme Court found nothing to comment on. In *Manor Vail Condominium Ass'n v.*

Town of Vail, 604 P.2d 1168 (Colo.), the Supreme Court of Colorado considered a rather broad challenge to an ordinance of the Town of Vail regulating cable television. A franchise had there been granted to a subsidiary of the plaintiff in this action. The ordinance also fixed rates under Colorado "home rule" authority. The company there sought to support the ordinance as a proper function of the town. The challenge basically was to categories established for rate making under the Constitution. The Colorado Supreme Court upheld the rate making as a valid exercise of regulatory authority. The court treated the issues as it would any regulatory authority exercised by the State of Colorado. Thus strict scrutiny compared to "legitimate state interest," was applied. The court also refers to the wide latitude to be afforded local governments in the exercise of police powers. The treatment of the rate issue in the *Manor Vail* case is significant to our problems here. The state court did not expressly discuss home rule, but assumed that the Town of Vail had full authority to regulate rates. The issue treated was how the regulation was carried out.

It is a mistake to generalize about "home rule" as it may be treated in opinions from different jurisdictions. We are concerned only with Colorado home rule under article XX, section 6, of the Colorado Constitution. The pertinent part reads:

> "Section 6. Home rule for cities and towns. The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

"Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

"It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

"The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters."

The trial court said during the hearing as to authority for the City of Boulder:

"THE COURT: If you get down to the ultimate source of the power, and governmental concepts, Boulder is exercising authority of the people of the state of Colorado in matters of local concern within Boulder, because the people of the state of Colorado exercising their ultimate sovereign power put Article 20 in the Constitution of this state. They are not operating under some delegated authority from the representatives in the general assembly. They are operating on the basis of the ultimate sovereign authority of the people of the state. That's what Colorado's Article 20 is all about."

The source of the authority of the City here is thus derived directly from the state constitution and is not a residual or delegated power. *See* the references in *City and County of Denver v. Henry*, 95 Colo. 582, 38 P.2d 895, to the situations where an ordinance may even supersede a state statute

as to matters of purely local concern. *See also Service Oil Co. v. Rhodus,* 179 Colo. 335, 500 P.2d 807, and *Davis v. City and County of Denver,* 140 Colo. 30, 342 P.2d 674. In any event, we are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City.

The Colorado Supreme Court has considered the scope of the Colorado version of home rule in several other cases including *Veterans of For. Wars, Etc. v. Steamboat Springs,* 575 P.2d 835 (Colo.), *Security Life and Accident Co. v. Temple,* 177 Colo. 14, 492 P.2d 63, and *Four-County Met. C.I. Dist. v. Board of County Com'rs.,* 149 Colo. 284, 369 P.2d 67. In the *Four-County Metro* case the court stated that the home rule cities in Colorado as to local matters had the complete authority.

The franchise of the plaintiff cable TV company is necessarily limited to service within the City of Boulder. The services provided are limited to City residents through the use of City streets and ways. The matter or subject is a local one. The Colorado court in the *Manor Vail* opinion assumed that the rate regulation of cable TV was a matter of local concern in the home rule context. *See also People v. Mountain States Tel. & Tel. Co.,* 125 Colo. 167, 243 P.2d 397. The Supreme Court in *TV Pix, Inc., v. Taylor,* 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed.2d 746, affirmed a three-judge court decision (304 F.Supp. 459, D.Nev.) holding that the regulation of the community antenna system was a local business and did not constitute an interference with interstate commerce. The facts before us represent a comparable situation.

It would not seem useful under these circumstances to explore the differences between control by contract or by police power. The City is not in the television business in

any way, and whether by contract or police power the action is an exercise of governmental authority. There is no element of proprietary interest of the City.

[1] We must hold that under the Colorado Constitution and under the *Manor Vail* decision that the regulation of the business of cable TV is well within the power and authority of the City of Boulder. Further, under the circumstances the regulation here concerned was the only control or active supervision exercised by state or local government, and it represented the only expression of policy as to the subject matter.

The record contains a number of transcripts of City Council meetings. The discussions were extensive and the purpose of the moratorium and the model ordinance was made clear. There are also statements of purpose accompanying the ordinances. The City adopted a policy of fostering competition to receive a franchise for cable TV within the City, again a non-exclusive franchise. The moratorium was to permit these applications under circumstances where there remained a substantial number of customers not yet connected to the cable of the plaintiff. This appears to be a very clear statement of policy on the public record. Whoever obtained the franchise or the additional franchise would be required to operate under the model ordinance. The ordinance had been formulated after hearings, discussions and negotiations. The City had a consultant to give advice on the matter.

[2] We cannot agree with the trial court that the City is not exempt from antitrust liability under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. In *Parker* suit was brought to enjoin enforcement of a California state agricultural proration program which restricted competition among growers and maintained prices. The Supreme Court found that the restraints of the plan were imposed as an act of government, and that such "state action" is not prohibited by the Sherman Act.

The trial court here apparently concluded that *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364, was controlling. However, in *Lafayette* the City was authorized to own and operate its electric utility. Louisiana Power & Light was sued by the City for anti-trust violations, and the utility counter-claimed under the Sherman Act for alleged anticompetitive activities. A divided Supreme Court ruled that the City was not immune from antitrust liability. The decision, considering the several opinions, was grounded on the fact that the action was not directed or authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S. at 413, 98 S.Ct. at 1137.

City of Lafayette must be distinguished from the case before us because, as discussed above, no proprietary interest of the City is here involved. In any event, the statement of policy requirement in *Lafayette* has been met as indicated in the home rule discussion herein.

The Supreme Court holding in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* — U.S. —, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), supports an application of the *Parker* exemption in these circumstances. The Court in *California Retail* set out two standards for governmental antitrust immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as State policy'; second, the policy must be 'actively supervised' by the State itself." (— U.S. at —, 100 S.Ct. at 943, *citing City of Lafayette, supra.*) This latest test for the *Parker* exemption has been met by the City of Boulder. The policy was affirmatively expressed through the language of the ordinances. The second part of the *California Retail* test was met by the active supervision and enforcement of the policy by imposition of the 90-day moratorium on construction and by issuance of civil and then criminal citations to cable workers when the moratorium was ignored.

We conclude that *City of Lafayette* is not applicable to a situation wherein the governmental entity is asserting a governmental rather than properietary interest, and that instead the *Parker-Midcal* doctrine is applicable to exempt the City from antitrust liability.

We must thus conclude that the trial court was in error as a matter of law as to the basis for issuance of the temporary restraining order. There is expressed no other basis for the restraining order than the antitrust factor.

In these circumstances we do not apply the usual standards outlined in *Penn. v. San Juan Hospital, Inc.*, 528 F.2d 1181 (10th Cir.); *Securities & Exchange Commission v. Pearson*, 426 F.2d 1339 (10th Cir.), and the typical cases.

[3] A temporary restraining order must be set aside although there may be no abuse of discretion as to the balance of equities or as to the matter of irreparable injury if the trial court has based its action to a substantial extent upon a determination of law which the appellate court considers to be in error. Of this doctrine the District of Columbia Circuit in *Northeast Construction Co. v. Romney*, 485 F.2d 752 (D.C.Cir.) said after referring to the broad discretion of the trial court as to the equities, irreparable injury, and related factors:

> "But a preliminary injunction must be reversed even where no abuse of discretion exists as to such matters, when the trial court has proceeded upon a premise as to the rule of law which the appellate court deems erroneous. We conclude that underlying the District Court's conclusion of law, that plaintiff is likely to succeed on the merits, is an erroneous legal premise that requires reversal."

See also United States v. School Dist. of Ferndale, 577 F.2d 1339 (6th Cir.); *Hamilton v. Butz*, 520 F.2d 709 (9th Cir.); *Grubbs v. Butz*, 514 F.2d 1323 (D.C.Cir.); *Society*

for Animal Rights, Inc. v. Schlesinger, 512 F.2d 915 (D.C.Cir.); and *Pullum v. Greene,* 396 F.2d 251 (5th Cir.).

Thus we must reverse the judgment and order of the trial court and remand the case. We also terminate our order entered in this action on May 9, 1980 which was directed to the plaintiff.

MARKEY, Chief Judge, dissenting.

With the greatest respect, I dissent. Though these remarks will not affect the course of Western Civilization, they are compelled by a conviction that the judgment below was eminently sound and unequivocally correct. Because, as set forth in its Memorandum Opinion and Order, the trial court committed no abuse of discretion, and because its judgment order is fully supportable on at least First Amendment grounds, I would affirm.

The Facts

In 1964, Boulder entered a 20-year, non-exclusive license-contract with a predecessor of plaintiff Community Communications Company (CCC), under which CCC was licensed to string cable throughout the city and to supply cable television (CATV) communications, that is, news, information, and entertainment, to Boulder's citizens. The contract is cancellable at will by the city. CCC has indisputably and at all times complied with that contract.

In 1973 and 1974, the city unsuccessfully sought bids for a cable operator to serve the entire city, to buy out CCC, and to submit to extensive regulation by the city.

In July of 1979, "Boulder Communications Company" (BCC), wrote the city, saying it had been formed by six citizens of Boulder, tendering a resolution under which it would receive a permit to build its system, stating that it would if permitted build its system, "whatever action the city takes in regard to [CCC]," stating its plan for stockholders of BCC to be Boulder citizens, and promising to supply Boulder with "the best that cable has to offer."

The city, though at all times fully free to do so, declined and still declines to grant BCC, or any other company, a non-exclusive license to compete with CCC in the cable market in Boulder. Though advised by its consultant that modern technology made open and free cable competition feasible, the city persisted in its position that only one cable operator could serve Boulder.

CCC's announcement of expenditures for expansion in Boulder were warmly applauded by the city's officials in May of 1979.

However, in the summer of 1979, the city re-launched its 1973-74 effort to find and install a cable operator which would serve the entire city and which would submit to broad control of its business by city officials.

The city decided that open competition would not produce the "best" cable TV operator, that it and not Boulder's cable consumers would decide which was "best," that there could be only one, and that the one must adhere to rigid controls by the city.

The city's Attorney advised that it lacked authority to impose those controls by regulations, but could do so using a bid-contract process in which the chosen company would agree to those controls.

The city drafted a "model ordinance" (contract) of twenty-two pages, to be entered by the one successful bidder, and giving the city pervasive controls of the selected cable operator's business, including its programming. Among the salient features of the model contract are:

> The city's right to purchase the cable company, at a price excluding good-will and limited to depreciated investment; the city's right of prior approval of every company contract; rate regulation; the city's right to

change rates at any time; a 5% franchise fee (two and one-half times the present fee); a requirement for five leased access channels; a compliant procedure monitored by the city manager, with a liquidated damage provision; a requirement to upgrade company facilities continually to state-of-the-art conditions; and a requirement for renegotiation, at specified intervals, of rate structures, free or discounted service, services provided, *programming offered,* and human rights.

In November, 1979, BCC again wrote the city, saying it was best qualified to serve Boulder, claiming support from citizen groups, stating a preference for an immediate permit under the city's "new policy ordinance." BCC accepted the "request for bid" situation, but warned that requesting bids would not solve legal "problems of an antitrust nature." BCC said the bid procedure would require that CCC's license be revoked, or that CCC agree not to expand (saying economics precluded more than one cable operator). Again denying the necessity for bids, BCC repeated its earlier offer to submit to the city's controls, and suggested that the city revoke CCC's license, offering in that event to purchase CCC's system. BCC closed with assurance that "there is no question that we are best suited to bring cable services to Boulder."

In December, 1979, fearing possible frustration of its plans, the city enacted ordinance 4473, imposing a 90-day moratorium on CCC's expansion, and ordinance 4472, repealing and reenacting CCC's license contract, with a section making CCC's continued operation in its existing area an "acceptance" of the 90-day moratorium and of the geographic restriction.

When CCC continued building, city authorities arrested its construction crews and tore down its cables.[1]

The city sought an injunction against CCC's expansion. An injunction was denied by Judge Neighbors, of the Boulder District Court. *City of Boulder v. Community Communications Company, Inc.*, No. 80-CV-0198. Noting that the federal court had assumed jurisdiction, Judge Neighbors added that he was not convinced the city would prevail on the merits, that the equities did not favor the city and that significant First Amendment issues were present.

In the present case, the district court issued this Order:

> ORDERED, that so long as the plaintiff, Community Communications Company, Inc., operates within the terms and conditions of Ordinance No. 2846, enacted October 6, 1964, [the original contract] the city of Boulder and all of its officers, agents, servants, employees, and attorneys are enjoined from taking any unilateral action to restrict, limit, or revoke the authority of the plaintiff to conduct its cable television business in the City of Boulder.

---

[1] It is not necessary to question the sincerity of the city's officials, acting in the belief that they were better able than Boulder's cable consumers to determine which cable operator was the "best" for Boulder's citizens. The refusal to permit individual consumers to decide among competitors in open competition has here spawned delay in service of new consumers, arrests, equipment tear-down, two law suits, an appeal, continuing litigation, and the concomitant expense to all local and federal taxpayers. That harm may be caused by the sincere who would do good is but a price to be paid, lest no good be ever done. In this particular case, however, the circumstances tend to confirm the wisdom animating the Sherman Act, its national policy insistence on open, free competition, and its prohibition against unnecessary interference therewith.

The First Amendment

The judgment below will be affirmed on appeal if any basis for affirmance, whether or not relied on below, appears in the record. *Carpenters District Council v. Brady Corp.*, 513 F.2d 1, 4 (10th 1975); *see SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943); *Casto v. Arkansas-Louisiana Gas Co.*, 597 F.2d 1323, 1325 (10th Cir. 1979); *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1124 (10th Cir. 1979); *Fleming Building Co. v. Northeastern Oklahoma Building and Construction Trades Council*, 532 F.2d 162, 166 (10th Cir. 1976).

In my view, just such a basis for affirmance, compelling in its force and thrust, lies in the city's violation of the rights of speech and press guaranteed to CCC, and to the citizens of Colorado and of the United States who reside in Boulder, by the First Amendment.[2]

Though both the state and federal trial judges expressed concern over violation of First Amendment rights here, the former disposed of the city's requested injunction primarily on jurisdictional grounds and the latter granted CCC's requested injunction primarily on Sherman Act considerations.

---

[2] Affirmance on First Amendment grounds avoids the constitutionality-risking interpretation of the Colorado constitution's "home rule" provisions found necessary by the majority to support absolute immunity of Colorado cities from the Sherman Act. Further, affirmance on First Amendment grounds avoids the concern expressed by Mr. Justice Blackmun in *City of Lafayette* for the effect on municipalities and their citizens of the Sherman Act's treble damage provisions.

The Colorado Attorney General's brief for *Amicus* State of Colorado, concentrating on Sherman Act considerations, "assumed *arguendo* that the first amendment may limit, but does not wholly prohibit" Boulder's authority.

That CATV is engaged in interstate commerce is clear. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-169, 88 S.Ct. 1994, 2000-01, 20 L.Ed.2d 1001 (1968). That Boulder's reach for massive control of the CATV market within its borders is an interference with that commerce is to me equally clear. But, as recognized by the federal trial court, another "wider concern" is that for the First Amendment.[3]

Looking at the proposed model contract ordinance as the source of First Amendment concerns, and noting that the city had not yet engineered an acceptance of that contract, the trial court deemed its effect merely prospective and contented himself with a warning.[4] In my view, as injurious

---

[3] Cable TV is a First Amendment speaker. See *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978) *(aff'd on other grounds sub nom. FCC v. Midwest Video*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d 692 (1979); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C.Cir. 1977) *cert. den.* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); *Greater Fremont, Inc. v. City of Fremont*, 302 F.Supp. 652 (N.D.Ohio 1968) *aff'd sub nom. Wonderland Ventures, Inc. v. City of Sandusky*, 423 F.2d 548 (6th Cir. 1970); *Weaver v. Jordan*, 64 Cal.2d. 235, 49 Cal.Rptr. 537, 411 P.2d 289 (1966), and *Television Transmission, Inc. v. Public Utilities Commission*, 47 Cal. 2d 82, 301 P.2d 862, 865 (1956).

[4] Concerning the First Amendment, the trial judge said:

> Obviously there are wider concerns, including interstate commerce, giving rise to some uncertainty about the power of the state government in this regard, both in terms of an obstruction to interstate commerce, and with respect to the First Amendment rights of communicators.
>
> There are two other aspects of this case which are deserving of preliminary observations at this time. The plaintiff has attempted to use the shield of the First Amendment to avoid any interference from City government. That is an obvious overstatement of the law and an attempt to escape the reality that the messages it chooses to transmit must pass through a medium which is subject to some control by the City.

to First Amendment freedoms as the model would be, the 90-day moratorium was itself an impermissible prior restraint on the right to speak and hear.

In effect, by its "ordinances" 4473 and 4472, the city has said to CCC, "Thou shall not speak your truth to any Boulder citizens residing outside your present area of operation for 90 days." To Boulder citizens in those areas, the city has said, "Thou shall not for 90 days hear CCC's speech."[5] It is difficult to imagine a more flagrant and chilling inroad on cherished First Amendment freedoms.

While the defendant Boulder readily concedes that the First Amendment would prohibit its control of the content of these transmissions it does assert both the right and the responsibility for restricting the use of the public ways in this communications system. The question, of course, is what are the limits of that authority? If controlling content of the programs is beyond those limits, is it different, either in degree or in kind, for the City government to prescribe the number, variety, and scope of programming and services to be offered? And, is it appropriate for the City administration to say that the acceptability of a cable company rests on its willingness to contribute free services to that government or to such institutions or groups as may be considered to be in need of benefit or reward? Stated bluntly, may the City exact tribute for its favor?

While these questions are not now ripe for decision, they are potential problems in this developing situation. It is inappropriate to ascribe any illegal or improper intent to action which has not yet been taken, but it may be helpful to give caution about the potential consequences of that which may be contemplated. The City should carefully consider the need to exercise its authority by narrowly drawn regulations which do not unnecessarily interfere with First Amendment freedoms, as the Supreme Court has cautioned in *Village of Schaumburg v. Citizens for a Better Environment,* 441 U.S. 922, S.Ct. 2029, 60 L.Ed.2d 395.

[5] The trial court referred to "interested persons who are not before the court."

It is further difficult to visualize a valid defense to a charge in this case of violating CCC's First Amendment rights, and those of Boulder's citizens outside CCC's present operating area. Absence of concentration on the issue below would appear of little or no moment here, where there is no issue of material fact, and all relevant facts are of record. Before the moratorium, CCC had the right to speak outside its area. During the moratorium it did not.[6] When it tried to speak, it was arrested and its cables were torn down.

There is no police-power suggestion of concern for the public safety and welfare in CCC's use of Boulder's rights-of-way. Nor could there be, that factor being handled by the public utility, with whom CCC contracts for poles on which to string its cables.

On appeal, the city's sole defense is to pretend, disingeniously and contrary to the extensive, uncontradicted testimony and the specific findings of the trial judge, and contrary to its own City Attorney's advice, that cable is a "natural monopoly." The city's sole argument in this case is that because there can be only one cable operator in Boul-

---

[6] Nor is CCC likely, under the city's plan, ever to speak again outside its present area. The city, after receiving the majority opinion, signaled its intent to impose a second moratorium. In its briefs here it repeated, ad nauseam, that its 90-day moratorium was merely "a one-time, temporary" delay in CCC's expansion. The city refused, however, to assure Judge Matsch that it would not impose second and continuing moratoriums if he denied the injunction. The city appealed the injunction interlocutorily, and moved to expedite, even though the moratorium expired the day after the injunction issued. Moreover, a failure to impose continuous moratoriums might, as the city elsewhere argues, allow CCC to "wire the entire city" and thus defeat the city's plan to grant either one monopoly for the entire city, or a number of monopolies, each in a specified district. Hence, the city must either abandon its present plan or it must continue to impose moratoriums on CCC's right to speak outside its present area.

der,[7] the moratorium was necessary to prevent CCC from "wiring the entire city" before the city could conduct its bid process and select what it considered the "best" company to enjoy that monopoly. Not to put too fine a point on it, that argument is today simply fallacious. As the trial judge found, and as the record makes clear, modern technology makes free and open competition both practically and economically available to the city by at least four competing cable communicators.[8]

Though the city may have difficulty getting a communicator who is not granted a monopoly of all or part of the city to submit to the massive controls of its "model ordinance," that fact could hardly justify the infringement of First Amendment freedoms inherent in its 90-day moratorium upon CCC's right to speak.[9]

Moreover, a desire to dictate who shall monopolize CATV communications in Boulder cannot serve as the articulated, compelling state or governmental interest required to justify an otherwise constitutionally prohibited silencing of the right of free speech and free press. That is true whether the awful sound of silence lasts for 9 days or 90 or 900.

---

[7] The city says it considered, and may still consider, "districting," i.e., parceling out areas of the city to different cable operators. The effect on the First Amendment, however, is the same, for the city would be restraining each operator from speaking outside his assigned area, and would be dictating each consumer's choice, limiting it to the one cable operator chosen by the city to speak to that consumer.

[8] The trial court said:

> Under the present technology, more than one cable company can be on the same poles without adversely affecting the public ways. While there certainly are finite limits to overbuilding, those limits are something beyond two companies.

and again:

> I disagree that the evidence shows that cable television is such

The city says the moratorium does not regulate program "content," but a stifling of all content is the ultimate in content regulation.

The city says the trial court rejected CCC's "claim that the moratorium violated the First Amendment" as "an obvious overstatement of the law"—but it was an allegation that the First Amendment precluded "any interference" that was so characterized by the trial court. Note 4, *supra*. There may, of course, be limited compelling government interests permitting some interference, as the cases have shown. As above indicated, however, an insistence on maintenance of monopoly is not such an interest.

The city cites *NBC v. United States*, 319 U.S. 190, 226, 63 S.Ct. 997, 1014, 87 L.Ed. 1344 (1943), wherein the FCC's denial of a broadcasting license was affirmed, forgetting that the FCC is statutorily empowered and required to parcel out scarce airwaves, in the physically limited broadcast spectrum, as the Court so clearly stated. That situation is entirely different from the one before us. Cited also are *Conley Electronics Corp., v. FCC*, 394 F.2d 620 (10th Cir. 1968); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968); *Great Falls Community Cable Co. v. FCC*, 416 F.2d 238, 240 (9th Cir. 1969); *Black Hills Video Corp. v. FCC*, 399

---

a natural monopoly that the only feasible competition is in the process of currying favor with the City Council to obtain a permit to operate. To the contrary, the evidence is that there can be competition in the marketplace, with the choice of price and service let to the consumers.

[9] The city and Colorado's Attorney General cite the refusal of BCC and 2 other potential cable operators to compete unless they are granted a monopoly over all or part of the city as "evidence" that "economics" preclude open competition. That the operations of multiple competitors may result in one getting more customers than another, however, is an inherent element of, not an economic barrier, to competition. *United States v. Alcoa*, 148 F.2d 416, 430 (2d Cir. 1945).

F.2d 65, 69 (8th Cir. 1968); and *Buckeye Cablevision, Inc. v.* FCC, 387 F. 2d 220, 225 (D.C. Cir. 1967), for the proposition that courts have upheld intrusions "greater than that posed here." It is answer enough that all of those cases involved FCC controls over re-transmission of broadcast signals, and none involved the egregious choking off of a licensee's contractually-based right to speak to more people within its licensed area.[10]

Even in respect of the broadcast medium, where scarcity of broadcast channels both requires and justifies regulation, the Supreme Court has jealously guarded the First Amendment, saying, for example, "It is the right of viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1974, 1806

[10] The city correctly says it cannot be forced to grant a license to "every operator that applies," but that is not to say that the city can unilaterally stifle the voice growth of an operator already licensed, for the sole purpose of enabling the city to choose a favorite monopolist or series of neighboring monopolists. Nor, assuming financial integrity and willingness to comply with police power regulations relating to use of the city's rights of way on the part of applicants, no reason is seen or cited why licenses should not be granted to those applicants.

[11] The city's brief repeats, in reference to the First Amendment, that its moratorium was to prevent CCC's monopolization and "to foster competition in" the marketplace. But the city could have done all that with ease by merely granting additional non-exclusive licenses. As established in the record, found by the trial judge, and not denied by the majority the moratorium, and its continuation, is critical to the city's effort to *prevent* competition and to *insure* monopolization, albeit by the monopolist its considers "best."

[12] The record of this interlocutory appeal reflects no intent by city officials beyond a desire to grant monopoly licenses to one

23 L.Ed.2d 371 (1969) (citations omitted). Here the city's actions, whether or not well-intentioned, reflected a callous and total disregard of "the right of the viewers and listeners," by preventing the 80-90% of Boulder's citizens outside CCC's operating area from receiving *any* cable communicator's ideas, until the city decides *which* one monopolist's ideas they will be permitted to hear.[11]

When, as studies show, the majority of our people get their news from television, I cannot, in First Amendment jurisprudence, and concerning action to still a growing voice, distinguish the dissemination of news and information by cable TV from that by newspapers.[12] Surely, an attempt by a city to use control of its streets and ways as a bludgeon to deny delivery of a newspaper to new subscribers for 90 days would be rapidly struck down on First Amendment grounds. The more so when it became clear that the denial was but a first step in a plan to insure the presence of only one newspaper, approved by the city and operating under the city's rigid control of its contracts and content.[13]

---

or more "best" monopolists. An absolute freedom to stifle unilaterally the growth of a licensed communicator, because city officials disliked its programming or its editorial position in an upcoming election, for example, could certainly chill the exercise of that communicator's First Amendment rights. Like the power to tax, a unilateral, arbitrary power to stunt can also be the power to destroy.

[13] Colorado's constitution speaks of city autonomy in "local and municipal matters." The trial court and majority here refer to "local concern." CATV is not merely a local matter, *United States v. Southwestern Cable Co.*, 392 U.S. at 168-169, 88 S.Ct. at 2000-01, but if it were, that fact would be irrelevant to First Amendment implications. It is difficult to imagine a more local enterprise than a newspaper composed, edited, printed, and distributed within any of the thousands of communities like Boulder in the United States. Moreover a Colorado city's authority in relation to non-communication type activities must be carefully circumscribed when it is applied to restrict First Amendment rights.

Even when then-extant technology indicated that CATV might be a natural monopoly, the court said in *Home Box Office, Inc. v.* FCC, 567 F.2d 9 at 46:

> In any case, scarcity which is the result solely of economic conditions is apparently insufficient to justify even limited government intrusion into the First Amendment rights of the conventional press, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247-256, 94 S.Ct. 2831, 2834-38, 41 L.Ed.2d 730 (1974), and there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point.

Further, in *Midwest Video v. FCC*, 571 F.2d 1025, 1053 (8th Cir. 1978) the court said:

> Government control of business operations must be most closely scrutinized when it affects communication of information and ideas, and prior restraints in those circumstances are presumptively invalid. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963).

All the injunction on review prohibited was unilateral restriction by the city of CCC's right to "conduct its cable television business." In my view the quoted phrase is a synonym for CCC's right to "speak." I would affirm the injunction on First Amendment grounds.

The Contract Approach

It should be remembered that we deal here also with *contractual* rights. All of the involved "ordinances" are, in fact and by their terms, contracts. The trial court found that the city "finessed" an apparent "lack of regulatory authority" by "use of a contract approach," in the 90-day moratorium "ordinance" 4472. CCC and the city are parties to the original license contract. It is not even argued that CCC has failed to pay the city's fee or breached its original con-

tract in any way. All the present injunction does is to require that the city honor its existing contract so long as it is honored by CCC. The injunction could be sustained on that ground alone, without injection of either First Amendment or antitrust considerations.

Though the original contract is terminable at will by the city, the city did not terminate it, the city's attorneys having advised that it could not do so absent breach by CCC. The city does not here argue that its power to terminate justified the 90-day moratorium on CCC's effort to serve more consumers under its contract. Nor, would it seem, can the city be heard to assert a right to unilaterally amend the contract, from one covering the right to serve the 82,000 residents of Boulder to one covering only the right to serve 10-20% of those residents presently offered service by CCC.

Though the parties may acquire, after trial, an answer respecting the city's liability or immunity under the Sherman Act, we are here confronted with the sole question of whether this court should affirm the injunction against unilateral action by the city to prevent CCC from carrying out its lawful business under its original and continuing contract. Common principles of contract law and equity would appear to impel affirmance.

As the trial court said:

In summary, the plaintiff has established the need for a preliminary injunction for the protection of its business from irrevocable injury which could occur pending the final resolution of this dispute, under the standards set forth in *Continental Oil Company v. Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964).[14]

---

[14] That the trial court may have founded its judgment primarily on reasons deemed erroneous by the majority on appeal is not controlling. It is a judment we review, not reasons.

The Sherman Act[15]

Beginning at the beginning, that is, with the Constitution, Article VI, Clause 2, reads in pertinent part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

It would seem hardly arguable that the federal antitrust law is among "the laws of the United States" and was made "in Pursuance" of the Constitution. Nor would it seem that federal judges appointed under the Constitution are any less "bound thereby" than "the Judges" who preceded them chronologically "in every State." Nor can I believe that the 55 cities of Colorado, or the many thousands of cities in the United States, are any less bound than state and federal judges. Nor can I believe that a city ordinance can do what "the Constitution or Laws of any State" cannot do, namely the creation of new immunities from "the supreme Law of the Land."

In 1942, concentrating on whether Congress intended the Sherman Act to apply to state legislative action, the Supreme Court held in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, that nothing in the Act or its

---

[15] The city has not yet been found guilty of violating the antitrust laws. We deal only with whether a city like Boulder may be enjoined from unilaterally restricting, limiting, or revoking plaintiff's lawful, contractual rights to operate its business. Though in my view the city's actions did violate the Sherman Act, and will probably be shown at trial to have done so, the majority opinion rests on immunity from suit, the violation being presumed. The brief of the Attorney General of Colorado argues persuasively against immunity, but is mistaken on the facts and therefore unpersuasive in arguing that there was no violation.

legislative history so indicated. Article VI not having been mentioned, it must be assumed that the Court, 38 years ago, considered the supremacy clause inapplicable in the absence of congressional intent that it be applied, in the particular case of the Sherman Act, to state legislation. Presumably, the alternative being nullification, the clause would require the states to avoid interference with application of the Act to "persons" and "corporations" within their borders. Indeed, unlike the facts here, the Court in *Parker* found no agreement or contract involved, and "no question of the state or its municipality becoming a partcipant in a private agreement or combination by others for restraint of trade." *Id.* at 351-52, 63 S.Ct. at 314.

Emphasizing our federalism, the Court in *Parker* said, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 351, 63 S.Ct. at 313.

Whatever may or may not be said of the relationship, if any, between Article VI and the 1942 holding of the Court in *Parker*, it would appear clear that *Parker* created an *exception*. That exception is limited to *state* legislative action. Indeed, the Court said in *Parker:* "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful," citing *Northern Securities Co. v. United States,* 193 U.S. 197, 332, 344-47, 24 S.Ct. 436, 454, 459-61, 48 L.Ed. 679 (1904), 317 U.S. at 351, 63 S.Ct. at 314.

Thirty-two years after *Parker,* the Court decided *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), saying, "anticompetitive activities must be compelled by direction of the State acting as a sovereign,"

Id. at 791, 95 S.Ct. at 2015. In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court reaffirmed that to be exempt anticompetitive activity must implement a *statewide policy*. *Id.* at 585, 96 S.Ct. at 3115. In *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Court said antitrust immunity can exist where a policy requiring anticompetitive conduct is part of a comprehensive regulatory scheme, clearly articulated, affirmatively expressed as state policy, and actively supervised by the state as policymaker. *Id.* at 362, 97 S.Ct. at 2698. In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Court addressed state action immunity for cities. After noting the strong presumption against implied immunity, *Id.* at 398, 98 S.Ct. at 1129, the Court ruled that municipalities are not automatically immune solely because they are governmental entities, *Id.* at 411, 98 S.Ct. at 1136, and that it must appear "that the legislature contemplated the kind of action complained of." *Id.* at 415, 98 S.Ct. at 1138.[16]

In my view, Colorado home rule cities do not have antitrust immunity under *City of Lafayette* standards. No state policy whatsoever exists in relation to cable TV. The subject is not mentioned in Colorado's Constitution or in

[16] Post *Lafayette* jurisprudence has been in accord. *See e. g., United States v. Texas Board of Public Accountancy*, 464 F.Supp. 400 (W.D. Tex. 1978), *aff'd per curiam*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925, 100 S.Ct. 262, 62 L.Ed.2d 180 (1979) (no immunity, prohibiting accountants from competitive bidding was neither directed by nor within contemplation of state Accountancy Act, authorizing rules for maintaining high standards for accountants); *Mason City Center Associates v. City of Mason City*, 468 F.Supp. 737 (N.D.Iowa 1979) (no immunity, anticompetitive agreement in exercise of city's zoning power was not within direction or contemplation of state statute conferring zoning powers and authorizing zoning mechanisms); *Pinehurst Airlines, Inc. v. Resort Air Services, Inc.*, 476 F.Supp. 543 (M.D.N.C. 1979) (no immunity, county board's statutory

any state statute. The Colorado Public Utilities Commission has declined to exercise jurisdiction over cable television. *See In re Investigation and Suspension of First Revised Sheet No. 6 of Colorado PUC No. 5 of Mountain States Telephone & Telegraph Company*, decision No. 70749, 19 (January 25, 1968). With no policy whatever on regulation of cable TV, by cities or otherwise, it can hardly be said that Colorado has a state policy "to displace competition" in cable TV with regulation or monopoly public service. Much less can it be said that Colorado has a comprehensive, clearly articulated, affirmatively expressed, and actively state supervised anticompetitive policy for cable TV.

Hear [*sic*] the majority says that because Colorado has done nothing and because Colorado constitution gives its cities "home rule," the 55 cities of Colorado are free of the Sherman Act, that they are within their borders "sovereign," that they are to be treated as states and thus within the exception of *Parker*. The majority also says that *California Retail*, in which a city was controlled by a state, is applicable here, where a city is controlling itself. But the dual government, state sovereignty approach of *Parker* and *California* is inapplicable here. We are a nation not of "city-states" but of States.

---

authority over airport did not authorize its prevention of airline becoming fixed base operator); *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated and remanded sub nom. City of Impact v. Whitworth*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *cert. denied*, 440 U.S. 911, 99 S.Ct. 1224, 59 L.Ed.2d 460 (1979) (no immunity, city zoning ordinance allegedly part of conspiracy in restraint of trade); *Kurek v. Pleasure Driveway & Park District*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978), *reinstated on remand*, 583, F.2d 378 (7th Cir. 1978) *cert. denied*, 439 U.S. 1090, 99 S.Ct. 873, 59 L.Ed.2d 57 (1979) (no immunity, park district's statutory authority over golf courses did not exempt price fixing not within direction or authorization of the governing statute.

Not mentioned by the majority is *City of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958), in which the Colorado Supreme Court rebuked home-rule cities which "think of themselves as being like medieval city-states with plenary powers," adding, at 444-445:

> The United States Constitution provides for a national system of *states*. All powers not expressly granted to the federal government are reserved to the *states or to the people*. . . . Clearly our federal system does not envisage as a part thereof city-states. It therefore allows that home rule cities can be only an arm or branch of the state with delegated power. (emphasis in original)

"[A]nything in the Constitution [of Colorado] to the Contrary notwithstanding," I think the Sherman Act must be applied to Boulder, if we would not have the pieces of the pie be larger than the pie.[17]

The majority interprets the Court's denial of immunity in *City of Lafayette* as occasioned by the presence there of proprietary interest and the absence there of direction or authorization by the state pursuant to state policy to displace competition with regulation or monopoly public service. It then dismisses *City of Lafayette* by calling Boulder's contractual activity "an exercise of governmental authority" (a label applicable to any and all action by any government), and by substituting, in reliance on Boulder's "home rule" status, the city's policy, which it describes as "fostering competition to receive a franchise," for the required-but-absent state policy "to displace competition."

---

[17] The Colorado constitution, as broadly and literally interpreted by the majority, would appear to render Boulder immune from the Sherman Act, and any other Act of Congress, at least insofar as the matter were viewable as one of "local concern," even if the state's policy was to encourage competition, and if state legislation prescribed adherence to the particular Act of Congress under review.

In *City of Lafayette*, the city owned and operated its electric utility. The plurality declined, however, the invitation to decide on that basis in the Chief Justice's concurring opinion. As Mr. Justice Marshall's concurring opinion emphasized, and the majority here appears to recognize, the "test established" in *City of Lafayette* is whether a city's action is "directed or authorized by the state 'pursuant to state policy to displace competition with regulation or monopoly public service.' "

If the city's direct enagagement in entrepreneurial activity had been so influential in *City of Lafayette*, the plurality would not, presumably, have required 22 pages to say so; nor would it have been required to explicate its "state policy to displace competition" rationale, nor would it have included the strong warnings against the implication of immunity.

Whatever guidance may be lurking in the lacuna of the five opinions in *City of Lafayette*, the key to its dismissal by the majority here appears to lie in the view that CATV is solely a matter of local concern. If that be so, the majority's literal interpretation of the Colorado constitution, its treatment of city action as state action, and its holding of absolute immunity from the reach of the Sherman Act, would display a surface logic. But, as the trial judge said, "there are wider concerns." The widest, as above indicated, is concern for First Amendment freedoms. The wider concern for the national policy of free and open competition should stay the hand of the courts in adding an exception for cities to the exception for states arising from *Parker v. Brown*. I would affirm the injunction, if necessary, on the grounds cited as a primary basis by the trial court, that is, that the city's conduct "in reasonable probability will be declared to be unlawful under the antitrust laws."

The Majority Opinion

The majority opinion is rooted in a perceived absolute immunity of the city from the federal antitrust laws, and, understandably, treats only that question. I remain sorely troubled, however, by what to me is a gnawing presence of negative pregnants.

First, the majority faults the trial judge for not differentiating between the "two principal actions" of the city.[18] But there was no reason to differentiate. The city's actions, like a man's legs, were of equal dimension and importance in the city's scheme. Moreover, as the majority recognizes, the moratorium expired the day after the injunction issued and the trial judge did differentiate, in considering the model ordinance and refusal to deny an intent to repeat the moratorium as substantial and continuing factors, which, as discussed above, they were and are.

Next, the majority faults the trial judge for objecting to the way things were done, not to what was done. But in its quote from the opinion below, the trial judge is pointing out that what was *done* was *not* "regulation," that what was *done* was *not* an exercise of the police power, and that what was *done was* an employment of the city's contracting function, which it unquestionably was.

The majority says the authority of the city is not an issue, but elsewhere says that whether the authority of the city encompasses an unlimited freedom to violate the

---

[18] There were actually three actions: (1) Ordinance 4473, the 90-day moratorium and its enforcement; (2) Ordinance 4472, making plaintiff's continued service an acceptance; and (3) creation and offering the proposed model ordinance, giving the city total control-by-contract of the cable TV business in Boulder, as well as the right to eventual ownership of that business. The city was specifically and repeatedly advised by its attorneys that only by use of its contracting power might it escape a charge of antitrust violation.

Sherman Act is the central issue. The majority then cites the Colorado Supreme Court's *Manor Vail* decision, finding it pregnant with possible relation to this case, though the court nowhere mentions the Sherman Act in that decision.[19]

The majority then visualizes cable TV as purely a local matter, a view in conflict with the directly contrary holding of the Supreme Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-169, 88 S.Ct. 1994, 2000-01, 20 L.Ed.2d 1001 (1968).[20]

Whatever may have been meant by dismissing the "differences between control by conrtact or police power" (the differences are substantial and on ocassion critical), the city is by its challenged ordinances very much "in the television business." The city's "ordinances" are, in fact and intent, *contracts*, reflecting a *proprietary* interest. In my view, as in that of the trial judge, the challenged actions of the city had nothing to do with public safety, the control of its ways being merely the weapon used to control

---

[19] The nature of the activity under review is important. Rates applicable to all similarly situated were set by the city in *Manor Vail*. In the present case, some citizens were permitted service by CCC, while others were denied that service, and the city's actions were specifically designed and intended to insure a monopoly.

[20] The majority's citation of *TV Pix, Inc. v. Taylor*, 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed.2d 746, as involving a situation comparable with this case appears strained. In *TV Pix*, the Supreme Court, by order and without comment, affirmed a judgment in which the district court, 304 F.Supp. 459 (D.C.Nev.), stated that cable TV *was* in interstate commerce but that its limited equipment regulation as a utility by the State did not unconstitutionally interfere with that commerce. That regulation was vastly different from the market control-by-contract attempted by the city here. Again, the federal antitrust law is nowhere mentioned in *TV Pix*.

entry to the cable market. Its actions were not government actions and were not an exercise of "governmental" authority. On the contrary, the city's "proprietary interest," and its desire to acquire a greater proprietary interest, permeated and dictated all of its actions here involved.

The majority then asserts that the city held discussions and hearings, stated its purposes, and employed a consultant, but elsewhere asserts that the issue is not the way things were done but what was done. And what was done was an apparent violation of the federal antitrust laws, as the majority confirms in its statement that "The city adopted a policy of fostering *competition to receive* a franchise, . . . " (my emphasis) that is, a competition *for* the market, not competition *in* the market. The relevance of the phrase, "again a nonexclusive franchise," like the city's insistence on calling its actions "pro-competitive", is difficult to understand in light of the city's unquestioned freedom at all times to grant additional non-exclusive franchises and its continued refusal to do so. The phrase may also be misunderstood if considered in any way related to the challenged city actions, which were an attempt to "restrict the lawful business" of plaintiff, having the "direct and immediate effect" of "a restraint of trade and an artificial and unreasonable geographical market allocation," as the trial judge correctly found.

As discussed above, I most respectfully disagree with the majority's effective adoption of the dissent in *City of Lafayette*. Nor can I find support for the result here in *California Retail*, which would permit immunity only when the restraint is "clearly articulated," "affirmatively expressed" and "actively supervised" by the *state*. The home rule status of Colorado cities, and the negative fact that state articulation, expression, and supervision are totally absent, cannot in my view make *California Retail* pregnant with pertinence here.

Lastly, though I agree that the trial court focused primarily on "the antitrust factor," this court should, as above indicated, take a broader view of the case.[21]

Treating the city's argument that it had the power of a state over local concerns, the trial court said:

> Obviously there are wider concerns, including interstate commerce, giving rise to some uncertainty about the power of the state government in this regard, both in terms of an obstruction to interstate commerce, and with respect to the First Amendment rights of communicators.

Recognizing that the city's total-control ordinance had not yet found a cable TV enterprise to accept it, but also recognizing the critical relationship of the moratorium and the model contract, the trial court cautioned:

> The City should carefully consider the need to exercise its authority by narrowly drawn regulations which do not unnecessarily interfere with First Amendment freedoms, as the Supreme Court has cautioned in *Village of Schaumburg v. Citizens for a Better Environment*, 441 U.S. 922, 99 S.Ct. 2029, 60 L.Ed.2d 395 (1979).

Attempting to follow this court's concern for equity in such circumstances, the trial court found CCC injury irreparable and balanced the equities, saying:

> If this lawsuit is finally decided in favor of the defendant City of Boulder, any injury which it may

---

[21] The majority recognizes that the first moratorium terminated long ago, yet appears to focus solely on that action. Though I view that action alone as impermissible on First Amendment grounds (and note its intended and inevitable repetition by the city following issuance of the majority opinion), I submit that it cannot be viewed in a vacuum.

> sustain can be remedied by removal of the cables involved in the extension of the plaintiff's plant.
>
> . . .

In balancing the equities, the trial court did indicate that the city's "conduct" was such that it "in reasonable probability will be declared unlawful under the antitrust laws," but took a broader look:

> What equity requires here is that the plaintiff be protected in the exercise of the lawful rights which it had prior to the conduct which in reasonable probability will be declared to be unlawful under the antitrust laws. In considering the public interest and how it may be affected by this injunction, it is necessary to look beyond Boulder to the national policy of protecting free market competition.

In reversing the judgment below (i.e., in vacating the injunction order) the majority effectively holds that the city is at liberty to unilaterally prevent the exercise of plaintiff's lawful contract rights, and cannot be stopped from doing so to the irreparable harm of plaintiff, regardless of equity, even pending completion of trial. Moreover, as I view the outcome here, the city can do so without citing a single valid basis or reason.

Convinced that the city has shown no basis for its infringement of CCC's and Boulder's citizens' freedom of press and speech, of CCC's contract rights, and of CCC's right to compete freely and fairly in the marketplace, I must, with reluctance and with full recognition of personal capacity for error, respectfully decline to join the majority opinion.

Conclusion

The city of Boulder's interference with the lawful business of plaintiff, as part of a plan to manipulate and control the market for cable TV services in Boulder, with inherent and concomitant infringement of CCC's and cable

consumers' First Amendment rights, fully justified the injunction. I would set aside Sherman Act considerations on this appeal and affirm the injunction order on First Amendment grounds.

COMMUNITY COMMUNICATIONS COMPANY, INC., a Colorado Corporation, doing business as Boulder Cable T.V.,

Plaintiff,

v.

CITY OF BOULDER, COLORADO, a Municipal Corporation, Boulder Communications Co., a partnership, Thomas Cross, Jack Kerner, Michael Thompson, Donald Passalaqua, Barry Telleen, and Dennis DuBe,

Defendants.

Civ. A. No. 80-M-62.

UNITED STATES DISTRICT COURT, DENVER, COLORADO

March 17, 1980.

MEMORANDUM OPINION AND ORDER

MATSCH, District Judge.

The plaintiff, Community Communications Company, Inc., (CCC), moved for a preliminary injunction to prevent the City of Boulder from restricting or revoking the rights which it claims from a revocable, nonexclusive permit granted to a predecessor company in 1964. That permit was issued in the form of an ordinance enacted by the Boulder City Council, as a franchise to use public ways in that city to string cables for a community antenna system, or cable television. The geographical area involved was the entire City of Boulder and the permitted use of public ways was for a period of twenty years, with the power to terminate reserved in the following language:

> SECTION 2. That the right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time . . . (Plaintiff's Exhibit No. 22)

Under that ordinance, CCC has provided cable television service to the University Hill area of Boulder, an area comprising approximately 20% of the City's residential units and blocked off from normal reception of Denver television stations. Up to February 1980, CCC provided basically only retransmission of television signals from Denver and from one station in Cheyenne, Wyoming. In February 1980, CCC established an earth station for the reception of remote channels via satellite. The result is a greatly increased access to a variety of programming, including movies, sports, and channels from distant major cities.

Up to late 1975, cable television throughout the country was concerned primarily with retransmission of television signals to areas which did not have normal reception, with some special local weather and news services originated by the cable operators. During the late 1970's however, satellite technology impacted the industry and prompted a rapid, almost geometric rise in its growth. As earth stations became less expensive, and "Home Box Office" companies developed, the public response to cable television greatly increased the market demand for such expanded services.

The "state of the art" presently allows for more than 35 channels, including movies, sports, FM radio, and educational, children's, and religious programming. The institutional uses for cable television are fast increasing, with technology for two-way service capability. Future potential for cable television is referred to as "blue sky", indicating that virtually unlimited technological improvements are still expected.

In May 1979, CCC wrote to the Mayor of Boulder advising her of its plans to expand cable television service to other areas of the City and to establish an earth station for satellite pick-up. To expand to new areas, CCC must contract with the public utilities for the use of their poles. Many such poles are jointly owned by the Public Service Co. and Mountain Bell Telephone Co., and a certain

amount of "communications space" is left available by them for use by cable companies. The utilities grant a license to the company, under which it must make advance payments if rearrangement of the poles is necessary to make room for the cables. This "pole rearrangement" is done by the utility company, after which CCC is free to string its cables. Contracts and pole rearrangements were being negotiated by CCC from May through the end of 1979.

Shortly after CCC's letter to the Mayor, a newly formed business organization, Boulder Communications Company (BCC), codefendant herein, expressed an interest in obtaining a permit and competing with CCC. In a letter to the City Manager, BCC outlined a proposal for a new system, acknowledging the presence of CCC in Boulder but stating that "(w)hatever action the City takes in regard to TCI, it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit." (Plaintiff's Exhibit 9)

The Boulder City Manager and City Council reacted to this development by initiating a review and reconsideration of cable television in view of the many changes in the industry since the 1964 ordinance. Accordingly, they hired a consultant, Robert Sample, and held a number of study meetings to develop a governmental response to these changes. The primary thrust of Sample's advice was that the City should be concerned about the tendency of a cable system to become a natural monopoly. Much discussion in the City Council centered around a supposed unfair advantage that CCC had because it was already operating in Boulder. Members of the Council, and the City Manager, expressed fears that CCC may not be the best cable operator for Boulder, but would nonetheless be the only operator because of its head start in the area. The Council wanted to create a situation in which other cable companies could make offers and not be hampered by the

possibility that CCC would build out the whole area before they even arrived.

The result of this process was enactment of an "emergency" ordinance on December 19, 1979 (Ordinance No. 4473), unilaterally amending the 1964 Ordinance under which CCC had been operating, by restricting CCC from expanding its area of service for a period of three months. On the same day, the Council enacted Ordinance No. 4472, which revoked the 1964 Ordinance and re-enacted it to include the same three month restriction. Both ordinances expressly stated that the purpose of this moratorium on construction was to give other cable companies an opportunity to make proposals to provide service to the City. The Boulder Council had accepted the view that such a restriction was necessary to prevent CCC from obtaining a competitive advantage by connecting up to new customers during the proposal and negotiation process. Additionally, while the Boulder Council was persuaded that it had some responsibility to regulate cable television, it had received legal advice which cast doubt upon its authority and which particularly cautioned about the possibility of violations of antitrust laws.

Apparently upon the view that any lack of regulatory authority could be finessed by the use of a contract approach, the City included the following language in Ordinance No. 4472:

> *SECTION 12.* The grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the grantee . . . (Plaintiff's Exhibit No. 27)

As a part of the process of soliciting applications from interested cable companies, the City drafted a proposed model ordinance and submitted it to the cable television industry with the request that those who wished to make proposals to enter the Boulder market should give their

comments on that draft. The objective of the total process was to select those applications meeting the City's criteria, apparently including acceptance of regulatory powers, and then enter into a period of negotiation culminating in an agreed ordinance which could not later be attacked by the permittee.

The plaintiff claims that the revocation of its permit and the enactment of the new ordinance, with the moratorium, have adversely affected its business in ways which generate several claims for relief. The contention which is of primary importance for this motion for preliminary injunction is that the City has violated Section 1 of the Sherman Act (15 U.S.C. § 1). The plaintiff asserts that Boulder and BCC are engaged in a conspiracy to restrict competition by replacing the plaintiff with BCC. While the plaintiff has gathered some circumstantial evidence which might indicate such a conspiracy, that evidence is insufficient to establish a probability that the plaintiff will prevail on this claim.

What CCC has shown is that to influence competition Boulder unilaterally prevented further expansion of the geographical area of the plaintiff's business. Whether the intent is to promote new competition by assuring other cable companies that most of Boulder will remain available to them for possible first service, and then to permit competing companies to overbuild in the same geographical areas, or whether there is a more insidious motive to supplant CCC with a de facto monopoly, the motion for injunctive relief requires consideration of the impact on CCC. Is Boulder's action in imposing a moratorium an unlawful interference with the plaintiff's business and with free market competition?

The plaintiff concedes that it does not have an exclusive license and it recognizes that the City has the right to grant additional licenses to compete in the same geographical area. Under the present technology, more than

one cable company can be on the same poles without adversely affecting the public ways. While there certainly are finite limits to overbuilding, those limits are something beyond two companies.

[1,2] The City contends that its conduct here cannot be violative of the antitrust laws because it is exercising police powers and has immunity under the doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, L.Ed. 315 (1943). That assertion requires an inquiry into the extent of Boulder's governmental authority. Clearly, the City has the right and responsibility to control and regulate the use of public ways. That is not disputed here. Accordingly, the City may impose such restrictions on the hanging of cables as may reasonably be necessary to protect the public and other franchise users of such property. Cable companies are entirely dependent upon their ability to use public ways for the cables necessary to transmit their programs. That obviously gives the City some leverage by controlling access to the consumer market. The scope of that leverage and the legality of its use are difficult questions.

Boulder is a home rule city under Article XX of the Colorado Constitution and claims broad regulatory power because there is a vacuum resulting from inaction by federal and state governments. Broadly stated, the people of Colorado have granted home rule cities autonomy in matters of local concern. Accordingly, though it is a municipality, the City of Boulder contends that it should be considered to have the power of state government as to such matters within its geographical area. There is no Colorado case which characterizes the operations of cable television companies as a matter of local concern. Obviously there are wider concerns, including interstate commerce, giving rise to some uncertainty about the power of the state government in this regard, both in terms of an obstruction to interstate commerce, and with respect to the First Amendment rights of communicators.

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), the Supreme Court held that both cities and states come within the reach of proscriptions of the Sherman Act and that the immunization under *Parker v. Brown*, *supra*, is limited to governmental acts. In the very recent opinion deciding *California Retail Liquor Dealers Assoc. v. Midcal Aluminum Inc.*, — U.S. —, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), the Court emphasized that antitrust immunity can be claimed for governmental action only when the action is taken pursuant to a clearly articulated and affirmatively expressed policy, actively supervised by the state.

[3] Assuming that Boulder does have the claimed authority to regulate cable television within the City in the manner which would be required to impose all of the terms and conditions in the draft ordinance which was submitted to the plaintiff and other cable companies, the approach taken is not an appropriate exercise and articulation of a policy of regulation. It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the final policy by exercising legislative power through an offer and acceptance mechanism. It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the City government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance has an anticompetitive effect. That is not this case. Here, upon the present record, *Parker v. Brown* is wholly inapplicable and Boulder is subject to antitrust liability under *City of Lafayette v. Louisiana Power & Light*, *supra* for actions which it has taken.

[4] Boulder does not claim that CCC has violated any of the terms and conditions of its operating authority under the 1964 or the 1979 ordinances. The City has also con-

ceded that while it may have the right to revoke the plaintiff's permit without cause, it may not take that action for an unlawful purpose.

What has happened up to this time in this case is not unlike those cases in which there is a unilateral refusal to deal unless certain anticompetitive conditions are met. See, *Sahm v. V-1 Oil Co.*, 402 F.2d 69 (10th Cir. 1968) and *Milsen Co. v. Sutherland Corp.*, 454 F.2d 363 (7th Cir. 1971). There is also a similarity with those cases in which retailers or distributors were coerced into unlawful conditions or restrictions by their suppliers, the suppliers claiming that a contractual right to terminate allowed them to cancel a previous agreement and impose new terms. *Interphoto Corp. v. Minolta*, 295 F.Supp. 711 (S.D.N.Y.1969) and *Continental Distributing Co. v. Somerset Importers*, 411 F.Supp. 754 (N.D.Ill.1976). See also, *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968). Most simply stated, Boulder has attempted to restrict the lawful business of CCC by preventing it from obtaining new customers for three months while potential competitors submit proposals for serving those same customers. The motivation may be to foster competition in the long run, but the direct and immediate effect is a restraint of trade and an artificial and unreasonable geographical market allocation.

[5, 6] I am in agreement with the defendants' contention that the record does not establish any agreement or conduct which can be considered to be a per se violation of the antitrust laws. Accordingly, the rule of reason is applicable here. I disagree that the evidence shows that cable television is such a natural monopoly that the only feasible competition is in the process of currying favor with the City Council to obtain a permit to operate. To the contrary, the evidence is that there can be competition in the marketplace, with the choice of price and service left to the consumers.

There are two other aspects of this case which are deserving of preliminary observations at this time. The plaintiff has attempted to use the shield of the First Amendment to avoid any interference from City goverment. That is an obvious overstatement of the law and an attempt to escape the reality that the messages it chooses to transmit must pass through a medium which is subject to some control by the City.

[7] While the defendant Boulder readily concedes that the First Amendment would prohibit its control of the content of these transmissions, it does assert both the right and the responsibility for restricting the use of the public ways in this communications system. The question, of course, is what are the limits of that authority? If controlling content of the programs is beyond those limits, is it different, either in degree or in kind, for the City government to prescribe the number, variety, and scope of programming and services to be offered? And, is it appropriate for the City administration to say that the acceptability of a cable company rests on its willingness to contribute free services to that government or to such institutions or groups as may be considered to be in need of benefit or reward? Stated bluntly, may the City exact tribute for its favor?

While these questions are not now ripe for decision, they are potential problems in this developing situation. It is inappropriate to ascribe any illegal or improper intent to action which has not yet been taken, but it may be helpful to give caution about the potential consequences of that which may be contemplated. The City should carefully consider the need to exercise its authority by narrowly drawn regulations which do not unecessarily interfere with First Amendment freedoms, as the Supreme Court has cautioned in *Village of Schaumburg v. Citizens for a Better Environment*, — U.S. —, 100 S.Ct. 826, 63 L.Ed.2d 73 (1979).

[8, 9] In summary, the plaintiff has established the need for a preliminary injunction for the protection of its business from irrevocable injury which could occur pending the final resolution of this dispute, under the standards set forth in *Continental Oil Company v. Frontier Refining Co.*, 338 F.2d 780 (10th Cir. 1964). The final outcome of this matter is far from predictable given the difficult questions which I have discussed in this opinion, and given the fact that the Boulder City Council has not yet acted on the applications which have been submitted in the proposal process. While the primary function of a preliminary injunction is to preserve the status quo until a final determination of the rights of the parties, that cannot mean that the parties are frozen in the positions they occupied immediately prior to the filing of the complaint. The circumstances surrounding this case are very fluid and there are interested persons who are not before the court. What equity requires here is that the plaintiff be protected in the exercise of the lawful rights which it had prior to the conduct which in reasonable probability will be declared to be unlawful under the antitrust laws. In considering the public interest and how it may be affected by this injunction, it is necessary to look beyond Boulder to the national policy of protecting free market competition.

If this lawsuit is finally decided in favor of the defendant City of Boulder, any injury which it may sustain can be remedied by the removal of the cables involved in the extension of the plaintiff's plant. It is not necessary to require the posting of a bond in an amount sufficient to cover the cost of that removal because the City already has that protection under the 1964 ordinance. Accordingly, only a bond to meet the jurisdictional requirements of Rule 65 need be posted, in the nominal amount of $100.00.

Upon the foregoing, it is

ORDERED, that so long as the plaintiff, Community Communications Company, Inc., operates within the terms

and conditions of Ordinance No. 2846, enacted October 6, 1964, the City of Boulder and all of its officers, agents, servants, employees, and attorneys are enjoined from taking any unilateral action to restrict, limit, or revoke the authority of the plaintiff to conduct its cable television business in the City of Boulder.

Constitutional Provisions, Statutes, And Ordinances Involved

The Colorado Home Rule Amendment, COLO. CONST. art. XX, § 6:

The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

Proposals for charter conventions shall be submitted by the city council or board of trustees, or other body in which the legislative powers of the city or town shall then be vested, at special elections, or at general, state or municipal elections, upon petition filed by qualified electors, all in reasonable conformity with section 5 of this article, and all proceedings thereon or thereafter shall be in reasonable conformity with sections 4 and 5 of this article.

From and after the certifying to and filing with the secretary of state of a charter framed and approved in reasonable conformity with the provisions of this article, such city or town, and the citizens thereof, shall have the powers set out in sections 1, 4 and 5 of this article, and all other powers necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

a. The creation and terms of municipal officers, agencies and employments; the definition, regulation

and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees;

b. The creation of police courts; the definition and regulation of the jurisdiction, powers and duties thereof, and the election or appointment of police magistrates therefor;

c. The creation of municipal courts; the definition and regulation of the jurisdiction, powers and duies thereof, and the election or appointment of the officers thereof;

d. All matters pertaining to municipal elections in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections or electoral votes non-partisan in character;

e. The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

f. The consolidation and management of park or water districts in such cities or towns or within the jurisdiction thereof; but no such consolidation shall be effective until approved by the vote of a majority, in each district to be consolidated, of the qualified electors voting therein upon the question;

g. The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special

assessments for local improvements; such assessments, levy and collection of taxes and special assessments to be made by municipal officials or by the county or state officials as may be provided by the charter;

h. The imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter.

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

All provisions of the charters of the city and county of Denver and the cities of Pueblo, Colorado Springs and Grand Junction, as heretofore certified to and filed with the secretary of state, and of the charter of any other city heretofore approved by a majority of those voting thereon and certified to and filed with the secretary of state, which provisions are not in conflict with this article, and all elections and electoral votes heretofere had under and pursuant thereto, are hereby ratified, affirmed and validated as of their date.

Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force.

The provisions of this section 6 shall apply to the city and county of Denver.

This article shall be in all respects self-executing.

BOULDER, COLO., ORDINANCE NO. 2846
(Oct. 6, 1964)

AN ORDINANCE GRANTING A REVOCABLE PERMIT OF THE CITY OF BOULDER, TO COLORADO TELEVENTS, INC., A COLORADO CORPORATION, TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM IN THE CITY OF BOULDER, FOR A PERIOD OF TWENTY YEARS; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, Colorado Televents, Inc., a Colorado corporation, with offices at 270 Columbine Street, Denver, Colorado, has made application to the City Council of the City of Boulder for a permit to conduct the business of a community antenna television system in said City of Boulder through the media of transmission by cables, and/or wires, or otherwise, commonly known as a Master Antenna Cable System, and;

WHEREAS, said cable system would be attached to poles whereby said cables, wires, and related appurtenances would cross over the streets, alleys, sidewalks, highways and other public ways and places of the said City of Boulder, and;

WHEREAS, the City Council is of the opinion that the operation of a community antenna television system is necessary so that those persons who are situated in the City so as not to get adequate television reception may receive the same; and,

WHEREAS, the City Council is of the opinion that the best and most practical method of providing said services is by granting to a private person or company, revocable authority and permission to operate such approved system upon terms and conditions prescribed and acceptable to the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That there is hereby granted unto Colorado Televents, Inc., its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, for a period of twenty (20) years from date of final adoption of this ordinance, to conduct the business of a Community Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 2. That the right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit the grantee shall at its own expense remove any poles, wires, cables and related appurtenances that shall have been erected and shall leave the streets, alleys, and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond, as provided in Section 10 hereof.

Section 3. The right to use and occupy said streets, alleys and other public ways for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use in said streets and alleys to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and con-

sent of the aforesaid public utility companies concerned, to affix said cables or wires, or other apparatus to their pole facilities.

Section 4. Poles or towers shall be so erected so as not to interfere with the traffic over the streets and alleys, and the location of all poles, towers or other structures on public property shall be placed with prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing further, that such location on public property shall not be a vested interest, and the same shall be removed by the grantee whenever, in the sole determination of the City, the same restrict or obstruct the operation or location of said streets, alleys, or public places, or municipal or franchised utilities located therein.

Section 5. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said cables, lines and other appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 6. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted, relative to the use of the streets, alleys, sidewalks and public ways and places of the City of Boulder.

Section 7. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 8. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be

reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 9. The company hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the system. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000/$300,000. Public Liability, and $25,000/$50,000. Property Damage. Said policy to be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 10. Within thirty (30) days after the final reading of this ordinance by the City Council, the grantee shall signify its acceptance of the terms herein by filing in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand dollars ($5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful performance of all the terms and conditions of the license or permit by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred; and upon the expiration of 30 days after final reading and upon filing of said bond this license or permit shall be in full force and effect for the full term hereof. The requirement for bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 11. The grantee shall commence operations as a community antenna television system in the City of Boulder within three (3) years from the effective date of this ordinance, or shall otherwise forfeit all rights and privileges granted hereunder, but otherwise this permit to remain in full force and effect.

Section 12. As a further consideration of this permit or license, and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two percent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantees books and records to verify the amount due the City as reported by the grantee.

This ordinance shall take effect upon the expiration of thirty (30) days from adoption and publication in accordance with the Charter of the City of Boulder.

BOULDER, COLO., ORDINANCE NO. 4472
(Dec. 18, 1979)

AN ORDINANCE REPEALING ORDINANCE NO. 2846, REVOKING THE PERMIT TO CONDUCT THE BUSINESS OF A COMMUNITY ANTENNA TELEVISION SYSTEM GRANTED THEREUNDER; RE-ENACTING SAID ORDINANCE WITH TEMPORARY GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; GRANTING A REVOCABLE PERMIT TO COMMUNITY COMMUNICATIONS COMPANY, INC., UNDER SAID ORDINANCE; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc., in 1964 to conduct the business of a Community Antenna Television System in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc., a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, the present permittee, Community Communications Company, Inc., has indicated that it intends to extend its services in the near future to an additional 35 miles of the City of Boulder right-of-way; and

WHEREAS, the City Council finds that such an extension of service by the current permittee would result in hindering the ability of other companies to compete in the Boulder market; and

WHEREAS, the City Council intends to adopt a model cable television permit ordinance, solicit applications from

interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits in a reasonably short time, not to extend past March 18, 1980, and finds that an extension of service by the current permittee would result in a disruption of this application and evaluation process; and

WHEREAS, the City Council finds that placing temporary geographical limitations upon the operations of the current permittee would not impair the present services offered by Community Communications Company, Inc., to City of Boulder residents, and would not impair the ability of the current permittee to improve those services within the area presently served by it; and

WHEREAS, the City Council finds that it is in the public interest to repeal Ordinance No. 2846, to revoke the permit now held by Community Communications Company, Inc., to re-enact said ordinance with temporary geographical limitations, and to grant a revocable permit to Community Communications Company, Inc., under said ordinance as re-enacted.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That Ordinance No. 2846 is hereby repealed, and the revocable permit granted thereunder to Colorado Televents, Inc. and its assignee, Community Communications, Inc., to conduct the business of a Community Antenna Television System in the City of Boulder is hereby revoked.

Section 2. That Ordinance No. 2846 is hereby reenacted to read as follows:

There is hereby granted unto Community Communications Company, Inc., a Colorado corporation and wholly owned subsidiary of Community Tele-Communications,

Inc., a Colorado corporation, its successors and assigns, hereinafter referred to as the grantee, the right, permit and privilege, until November 6, 1984, to conduct the business of a Community Antenna Television System in said City of Boulder; and to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder; save and except that the aforesaid rights and privileges shall be subject to the conditions, exceptions and limitations herein contained.

Section 3. The City Council intends within a time not to extend past March 18, 1980, to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits. During the pendency of this application and evaluation process, not to extend past March 18, 1980, the grantee's right, permit and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

It is the intent of this Section 3 that the grantee shall not expand its present system through working in the public right-of-way beyond the geographical areas presently served by the grantee during the effective period of this Section. In addition to any and all other remedies available to the City,

a violation of this Section shall be grounds for immediate revocation of the permit granted herein and forfeiture of the performance bond referred to herein.

This Section shall expire and be of no effect upon the completion of the application and evaluation process described herein, and in any case no later than March 18, 1980.

Section 4. The right, permit and privilege herein granted is subject to revocation by the City Council, at its pleasure, at any time. In the event of revocation, termination or expiration of this permit, the grantee shall, at its own expense, remove any poles, lines, cables, wiring, and related appurtenances that shall have been erected and shall leave the streets, alleys, highways and public ways and places in as good condition as they were prior to said installation. To this end the grantee shall post a performance bond as provided in Section 10 hereof.

Section 5. The right to use and occupy said streets, alleys, highways and other public ways and places for the purposes herein set forth shall not be exclusive, and the City reserves the right to grant a similar use to any other person or persons. Wherever possible, the company shall use existing facilities of public utility companies, provided said grantee, or its assigns, first secures the permission and consent of the aforesaid public utility companies concerned, to affix said lines, cables, wiring or related appurtenances to their pole facilities.

Section 6. Poles or towers shall be so erected so as not to interfere with the traffic over the streets, alleys, highways and other public ways and places, and all poles, towers or other structures placed on public property shall be placed with the prior written approval and under the supervision of the City of Boulder as to such location, giving consideration to the reasonable operation of the same; providing fur-

ther, that such location on public property shall not be a vested interest, and the same shall be removed by the grantee whenever, in the sole determination of the City the same restrict or obstruct the operation or location of said streets, alleys, highways, or other public ways or places, or municipal or franchised utilities located therein.

Section 7. Any and all streets and sidewalks disturbed or damaged in the construction or maintenance of said lines, cables, wiring or related appurtenances shall be promptly repaired by the grantee, at its expense, and to the satisfaction of the City of Boulder.

Section 8. The grantee shall be subject to all ordinances now in force, or that may hereafter be enacted, relative to the use of the streets, alleys, highways and other public ways and places of the City of Boulder.

Section 9. The covenants, conditions and limitations of this permit shall be binding upon the successors and assigns of the grantee, and the right granted hereunder shall not be assigned or subleased by the grantee without the prior written approval of the City of Boulder.

Section 10. The City reserves the right to adopt, from time to time, in addition to the provisions herein contained, such ordinances as may be deemed necessary to the exercise of the Police power; provided, that such regulations shall be reasonable and not destructive to the rights herein granted and not in conflict with the laws of the United States, the State of Colorado, or other local laws or regulations.

Section 11. The grantee hereby expressly agrees that it will save, keep harmless and defend the City of Boulder from any and all damages and liabilities it may have or sustain by reason of the construction, operation or maintenance of the activities permitted hereby. This will be guaranteed to the City by a Public Liability and Property Damage Policy to the City in the amount of $100,000/$300,000 for pub-

lic liability, and $25,000/$50,000 for property damage. Said policy shall be negotiated and paid for by the grantee and kept in effect throughout the term of this permit.

Section 12. The grantee shall signify its acceptance of the terms hereof by continuing to provide service to any customers presently served by the grantee. The grantee shall file in the office of the Director of Finance of the City of Boulder, a bond in the sum of Five Thousand dollars ($5,000.00), to be executed by the grantee, with good and sufficient surety, running to and in favor of the City of Boulder, and conditioned upon the full and faithful performance of all the terms and conditions hereof by said grantee, its successors and assigns, and upon the further condition that the City shall be saved harmless from any damage arising out of the exercise by said grantee, its successors and assigns, of the rights hereby conferred. The requirement for a bond running to the City of Boulder may be met by the grantee furnishing to the City a certificate, satisfactory to the Director of Finance and Record, showing that a bond in like amount and for the same purposes and conditions as set forth herein has been furnished to a public utility company franchised by the City of Boulder.

Section 13. As a further consideration of this permit or license and in lieu of all occupation and license taxes or other taxes on the right to do business, the grantee agrees to pay on the 1st day of January annually to the City of Boulder a sum equal to two percent (2%) of its gross revenue derived from the conduct of its business within the corporate limits of the City or $100, whichever is the greater. The City shall have access to the grantee's books and records to verify the amount due the City as reported by the grantee.

Section 14. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

EXHIBIT A

An area described as follows:

A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersect, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knollwood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station, to the area set forth above.

BOULDER, COLO., ORDINANCE NO. 4473
(Dec. 18, 1979)

AN EMERGENCY ORDINANCE AMENDING ORDINANCE NO. 2846 TO PLACE TEMPORARY GEOGRAPHICAL LIMITATIONS UPON THE GRANTEE; AND SETTING FORTH DETAILS IN RELATION THERETO.

WHEREAS, the City Council of the City of Boulder granted a revocable permit to Colorado Televents, Inc., in 1964 to conduct the business of a Community Antenna Television System in the City of Boulder; and

WHEREAS, said permit was transferred and assigned to its current holder, Community Communications Company, Inc., a wholly owned subsidiary of Community Tele-Communications, Inc., in 1966; and

WHEREAS, cable television companies have within recent months displayed interest in serving the community and have requested the City Council to grant permission to use the public right-of-way in providing that service; and

WHEREAS, the present permittee, Community Communications Company, Inc., has indicated that it intends to extend its services in the near future to an additional 35 miles of the City of Boulder right-of-way; and

WHEREAS, the City Council finds that such an extension of service by the current permittee would result in hindering the ability of other companies to compete in the Boulder market; and

WHEREAS, the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits in a reasonably short time, not to exceed 3 months, and finds that an extension of service by the current permittee would result in a disruption of this application and evaluation process; and

WHEREAS, the City Council finds that placing temporary geographical limitations upon the operations of the current permittee would not impair the present services offered by Community Communications Company, Inc., to City of Boulder residents, and would not impair the ability of the current permittee to improve those services within the area presently served by it.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER, COLORADO:

Section 1. That Ordinance No. 2846 is hereby amended by the addition of the following sections:

The City Council intends within a time not to exceed 3 months from the adoption of this ordinance to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits. During the pendency of this application and evaluation process, not to exceed 3 months from the adoption of this ordinance, the grantee's right, permit, license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

It is the intent of this Section 1 that the grantee shall not expand its present system through working in the public right-of-way beyond the geographical areas

presently served by the grantee during the effective period of this Section. In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.

This Section shall expire and be of no effect upon the completion of the application and evaluation process described herein, and in any case no later than March 18, 1980.

Section 2. The City Council finds that initiation of the application and evaluation process described herein is of immediate importance to the residents of Boulder, and that it is necessary to impose a temporary geographical limitation upon the grantee without delay. The City Council finds that an emergency exists, and that this ordinance is necessary for the preservation of the public peace, health, and safety.

Section 3. If any part or parts hereof are for any reason held to be invalid, such shall not affect the remaining portions of this ordinance.

EXHIBIT A

An area described as follows:

A point at which the City limits of the City of Boulder on the West and the Northern boundary line of the National Bureau of Standards property intersect, East along the Northern boundary line of the National Bureau of Standards property to Broadway, North on Broadway to University Avenue, East on University Avenue to 17th Street, North on 17th Street to Canyon Boulevard, West on Canyon Boulevard to 9th Street, North on 9th Street to Spruce Street, West on Spruce Street to the Eastern boundary of Knollwood Village, North along the Eastern boundary of Knoll-

wood Village to the City limits of the City of Boulder on the West, and South along the City limits to the point of beginning, plus any area used for any earth station and any area used for the transmission of signals from any earth station, to the area set forth above.

The Colorado Antitrust Statute, COLO. REV. STAT. §§ 6-4-101, 6-4-102 (1974 & Supp. 1980):

6-4-101. Illegal restraint of trade. Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is declared illegal. Every combination, conspiracy, trust, pool, agreement, or contract intended to restrain or prevent competition in the supply or price of any article or commodity constituting a subject of trade or commerce in this state, or every combination, conspiracy, trust, pool, agreement, or contract which controls in any manner the price of any such article or commodity, fixes the price thereof, or limits or fixes the amount or quantity thereof to be manufactured, produced, or sold in this state, or monopolizes or attempts to monopolize any part of the trade or commerce in this state, is declared an illegal restraint of trade.

6-4-102. Unlawful conspiracy. Every person, corporation, copartnership, trustee, or association who, either as principal or agent, makes any contract or engages in any combination, conspiracy, trust, pool, or agreement declared unlawful or an illegal restraint of trade under this article, or who combines or conspires with any other person, corporation, copartnership, association, or trustee to monopolize any part of the trade or commerce in this state is guilty of an unlawful conspiracy and, upon conviction thereof, shall be punished as provided in section 6-4-107.

The Municipal Powers Statute, COLO. REV. STAT. § 31-15-702 (1) (1974) provides in pertinent part:

31-15-702. Streets and alleys. (1) The governing body of each municipality has the power:

(VI) To regulate and prevent the use of streets, parks, and public grounds for signs, signposts, awnings, awning posts, and power and communications poles, and for posting handbills and advertisements; to regulate and prohibit the exhibition or carrying of banners, placards, advertisements, or handbills in the streets or public grounds or upon the sidewalks; and to regulate and prevent the flying of flags, banners, or signs across the streets or from houses. . . .

The Sherman Antitrust Act §§ 1, 2, 26 Stat. 209, as amended 15 U.S.C. §§ 1, 2 (Supp. 1980) :

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The supremacy clause, U.S. CONST. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

COLORADO PUBLIC UTILITIES COMMISSION

Re The Mountain States Telephone and Telegraph Company

Protestants: Colorado Municipal League, City of Colorado Springs, Silver King Cable Company, Pueblo T. V. Power, Incorporated et al.

I. & S. Docket No. 595, Decision No. 70749

January 25, 1968

By the COMMISSION: On September 1, 1967, The Mountain States Telephone and Telegraph Company, 930 Fifteenth street, Denver, Colorado, filed with the Public Utilities Commission of the state of Colorado a proposed change in its Colorado PUC No. 5 tariff. The proposed change was filed generally under the provisions of 1963 CRS 115-3-4 and 115-6-11 to become effective on statutory notice on October 1, 1967, unless suspended by the commission.

On September 12, 1967, the Colorado Municipal League filed a pleading with the commission denominated as a complaint, requesting the commission to suspend the proposed tariff change, conduct a hearing on the matter, and after hearing, enter an order permanently suspending the proposed tariff change. On September 13, 1967, the city of Colorado Springs filed a protest to the proposed tariff change requesting similar relief from the commission. On September 6, 1967, Pueblo T. V. Power, Inc., by and through its attorney, filed a letter of protest requesting a public hearing on the proposed tariff change. On September 21, 1967, Mountain States Video, Inc., filed a letter with the commission objecting to the proposed tariff change. On October 2, 1967, Colorado Community Television Association filed a letter with the commission objecting to the proposed tariff change. On October 6, 1967, Fred M. Betz, Jr., filed a letter with the commission objecting to the pro-

posed tariff change. On November 13, 1967, the city of Canon City filed a letter with the commission protesting the proposed tariff change. On November 22, 1967, Silver King Cable Corporation filed a pleading with the commission denominated as a complaint, and requesting generally the same relief sought in the complaint filed by the Colorado Municipal League.

On September 15, 1967, the Public Utilities Commission of the state of Colorado entered its Decision No. 70094, suspending the effective date of the proposed change in the tariff of The Mountain States Telephone and Telegraph Company, instituting the instant investigation into such proposed change, which investigation was docketed as "Investigation and Suspension Docket No. 595," and setting the matter for hearing in the hearing room of the commission, 532 State Services building, 1525 Sherman street, Denver, Colorado, at 10 A.M. on November 28, 1967.

After due and proper notice to all interested parties, the matter was heard by the commission at the designated time and place, the hearing being concluded on November 29, 1967.

Robert J. Pringle, the Colorado vice president and general manager of The Mountain States Telephone and Telegraph Company, testified as the sole witness for such respondent telephone company in support of the proposed tariff change. No exhibits were introduced in evidence by such respondent telephone company. Such respondent, however, did provide for the use of the commission, as well as all participants in the proceeding, a complete copy of the tariff under consideration in the instant proceeding. This tariff is entitled "Channel Service for Use in Community Antenna Television Systems Regulations and Schedule of Charges," and is designated as Colorado PUC No. 5. The commission now takes official notice of such tariff as originally issued on October 31, 1966, and all changes thereto,

and the secretary of the commission is directed to furnish copies thereof for the record in the event that an appeal is taken by any party in the proceeding.

The following witnesses were called by the protestants and testified:

Irving S. Hook, a certified public accountant, a lawyer, and a Councilman of the city of Denver; T. Eugene McCleary, Mayor of the city of Colorado Springs; Gordon D. Hinds, City Attorney for the city of Pueblo; Tom Coffey, City Manager of the city of Fort Collins; Bill Daniels, Director and Past President of the National Cable Television Association, President of Vumore Video (Colorado Springs), President of Pueblo Vumore, Greeley Video, Longmont Video, Fort Collins Video, and Loveland Video, and Chairman of the Board of Directors of Western Cable Television (Manitou Springs), testifying as a witness for Pueblo T. V. Power, Incorporated; Glenn R. Jones, President of Silver King Cable Company; Phil S. Tunks, President of Community Communications Company; a cable television operator with six (Boulder, Leadville, Salida, Monte Vista, and Delta) systems in Colorado, and a representative of the Colorado Community Television Association. Protestants identified and offered in evidence the following exhibits:

No. 1. A copy of Ordinance No. 343 of the city and county of Denver passed on October 16, 1967. Admitted

No. 2. A copy of Ordinance No. 3499 of the city of Colorado Springs passed on final reading on June 27, 1967. Admitted

No. 2-A. A copy of Vumore Video's cable television bid made to the city of Colorado Springs, dated August 1, 1967. Admitted

No. 2-B. Award of CATV permit under Ordinance No. 3499 made by the city of Colorado Springs to Vumore Video Corporation of Colorado, Inc. Admitted

No. 3. A copy of a cable television bid submitted to the city of Fort Collins, dated November 1, 1967. Not Admitted

No. 4. A copy of a 3-page letter, dated August 4, 1966, from Colorado Cablevision Corporation to the mayor and council of the city of Colorado Springs. Not Admitted

No. 5. A copy of letter (dated October 10, 1966) and an attached bid made by Southern Colorado Cablevision, Inc., to the Pueblo City Council. Not Admitted

No. 6. A copy of a "Trilateral CATV Pole Attachment Agreement." Admitted

No. 7. A publication of the Colorado Municipal League entitled "A Municipal Guide to CATV." Admitted

No. 8. A large diagram of a utility pole and attachments thereto. Withdrawn

Protestants' Exhibits No. 1, 2, 2-A, 2-B, 6, and 7 were admitted in evidence. Protestants' Exhibits No. 3, 4, and 5 were not admitted. Protestants' Exhibit No. 8 was not offered in evidence and was withdrawn.

Upon conclusion of the taking of testimony, the commission authorized all parties who might desire to so do, including the Colorado Community Television Association (as amicus curiae), to file briefs on or before January 15, 1968. The commission then took the matter under advisement. The transcript of testimony was filed with the commission

on December 27, 1967. The time for filing briefs has expired, and the matter is now before the commission for determination.

Findings of Fact

After due and careful consideration of the entire record in this proceeding, the commission finds as fact that:

1. The Mountain States Telephone and Telegraph Company, hereinafter referred to by full corporate name, as Mountain States Telephone, or as respondent, is a corporation duly organized and existing under the laws of the state of Colorado, with offices located at 930 Fifteenth street, Denver, Colorado. American Telephone and Telegraph Company, with offices at 195 Broadway, New York, New York, owns 86.75 per cent of the stock of The Mountain States Telephone and Telegraph Company. Mountain States Telephone operates as an interstate communications public utility in the state of Colorado under the jurisdiction of the Federal Communications Commission. Mountain States Telephone operates as an intrastate communications public utility in the state of Colorado under the jurisdiction of the Public Utilities Commission of the state of Colorado.

2. Television, as the term is generally used, is the electromagnetic transmission and virtually instantaneous reception of still or moving pictures with accompanying sound. Television signals can be so transmitted either by the use of radio waves or over wire (cable), or a combination of both. In so far as the general public is concerned, television service consists of various television broadcasting stations, which transmit programs that can be received on television receiving sets located within the range of the broadcasting station. The normal television receiving set is capable of receiving 12 channels (Channels 2 to 13, inclusive). The antenna utilized by these individual television receiving sets to pick up the broadcast television signal may range from

"rabbit ears" to relatively large antennas located on 50-foot, or higher, towers. In certain areas where reception is not good because of distance or topographical features, so-called "booster" or "translator" stations may be installed. A "booster" station has an antenna which picks up the signal of a specified broadcasting station, and a transmitter which rebroadcasts such signal on the same wave length or channel. A "translator" station performs the same function, but the rebroadcast is on a different wave length or channel. The effect of either a "translator" or a "booster" station is to permit a television broadcasting station to be received by television receiving sets located beyond the normal broadcasting range of the station. The television signal is still picked up by the antenna attached directly to the television set. These "booster" or "translator" stations are normally installed as community nonprofit projects in areas where the residents desire to obtain either additional or better television reception. The use of either "booster" or "translator" stations does not constitute community antenna television as such term will be used later in this order. Television broadcasting stations, as well as "booster" and "translator" stations, are subject to the regulatory jurisdiction of the Federal Communications Commission. The Colorado Public Utilities Commission has no regulatory jurisdiction over television.

3. The term "community antenna television," as used herein, and hereinafter sometimes referred to as CATV, involves the reception of television signals from several (one to 12) direct television broadcasting stations by use of a large master antenna, and the distribution of such television signals from such master antenna not by rebroadcast but by coaxial cable throughout a given geographic area. Such coaxial cable (as now in use) has a 12-channel capacity. Owners of television receiving sets in such area can then receive "community antenna television" by hooking into such coaxial cable system in the same way that they would receive

electric service or telephone service, namely, a service drop from the alley or street which would connect their television receiving set with the distribution cable. The television set owner then receives television signals by cable, rather than from his own antenna. We will hereafter refer to the master antenna and its attendant facilities as the "head-end" system; the cable and its attendant facilities as the "distribution" system; and all equipment used to connect the distribution system to the various individual television receiving sets as the "individual service" system. We will also refer to the point at which the television signals enter the distribution system from the "head-end" system as the in-put point, and the point where such signals leave the distribution system to enter the individual service system as the out-put point. Normally, there will be only one in-put point but there will be a separate out-put point for each television set owner receiving the service, just as there would be a separate out-put point for each electric customer.

4. Community antenna television has many advantages over normal television in so far as the ordinary television set owner is concerned. The two most important advantages are (1) that CATV provides consistently better television signals thereby providing a better picture on the screen of the television set owner, and (2) that normally CATV makes more channels available for the television set owner to watch. It would be technically possible for CATV to carry twelve separate direct television broadcasting stations. Because of the advantages of CATV, it is economically possible for complete CATV systems to be installed, and the public appears to be willing to pay sufficient monthly amounts for CATV service to make the operations of such CATV systems profitable. A person, firm, or corporation engaged in the business of providing CATV service will hereinafter be referred to as a CATV system operator. A television set owner who subscribes to the CATV service will hereinafter be referred to as a service subscriber. In the tariffs of Moun-

tain States Telephone hereinafter discussed, CATV system operators are referred to as "customers," and service subscribers are referred to as "patrons."

5. Mountain States Telephone does not provide CATV service. As a communication utility, however, it does hold itself out as ready, willing, and able to provide any CATV system operator with the necessary distribution service. In other words, Mountain States Telephone will accept the television signals from the "head-end" system of the CATV system operator at the in-put point, and over its own communication distribution (coaxial cable) system will deliver (for specified tariff charges) such television signals to the out-put points necessary for the CATV system operator to render CATV service to the service subscribers. This communications utility service is available to any and all CATV system operators that apply to Mountain States Telephone for such service. Mountain States Telephone has filed an interstate tariff covering channel service for use in community antenna television systems provided in the state of Colorado with the Federal Communications Commission. This interstate tariff is similar to Mountain States Telephone Colorado intrastate tariff (Colorado PUC No. 5). The interstate tariff is applicable to the distribution of all broadcast television signals received at the head-end system of the CATV system operator. *In other words, if a CATV system operator simply retransmits the broadcast television signals of direct broadcasting television stations, the distribution service rendered by Mountain States Telephone, even though performed solely in the state of Colorado, would be a purely interstate service, and not subject in any way to an intrastate tariff.*

6. The question now arises as to what channel service for use in community antenna television systems rendered by Mountain States Telephone in the state of Colorado is intrastate in character and subject to an intrastate tariff. As

we have hereinbefore stated, direct broadcast television stations are subject to the regulatory jurisdiction of the Federal Communications Commission. The Federal Communications Commission is also exercising regulatory jurisdiction to a limited degree over CATV system operators. Under applicable FCC regulations, a CATV system operator may not originate its own programs, except as to specified public interest television program material. Such locally originated public interest material is intrastate in character and when tendered to Mountain States Telephone for transmission over its distribution system is subject to a Colorado intrastate tariff. To provide for the rendition of this limited intrastate service, Mountain States Telephone filed with the Colorado Public Utilities Commission on October 31, 1966, to be effective December 1, 1966, its intrastate tariff (Colorado PUC No. 5) providing for the intrastate rendition of channel service for use in community antenna television systems. This tariff recognized the limited extent of intrastate service by providing in § II-D thereof:

"D. Use. Service is furnished to customers for the purpose of distributing locally originated public interest television program material such as weather information and locally originated news events and music programming by means of an intrastate closed circuit television network to the out-put points of all patrons of the customer as an incidental part of the customer's primary offering of interstate community antenna television service."

The CATV system operator has twelve channels available to render CATV service. Such operator might decide to use none of these channels for limited locally originated program material, in which case the interstate tariff would apply to his entire operation, or such operator might decide to use one or two of such channels for originating his own music programming, weather information, or news, in which case the intrastate tariff would apply to the use of these one

or two channels. *In either event, it is obvious that the primary service rendered by the CATV system operator will be interstate in character subject to interstate tariff, and the intrastate service rendered will be relatively minor, and in some cases nonexistent.*

7. On September 1, 1967, Mountain States Telephone filed with the commission its Advice Letter No. 435 with proposed tariff page changes attached proposing to change its intrastate *channel service for use in community antenna television systems tariff* (Colorado PUC No. 5) by deleting therefrom subsection F, § II, found on page 6 of said tariff, which reads:

"F. Obligation of Customer (CATV System Operator). The customer (CATV system operator) shall be responsible for obtaining any authority to provide CATV service to its patrons (service subscribers) that may be required by law or local ordinance." (Parenthetical material inserted by commission.)

This proposed deletion was to have become effective on statutory notice on October 1, 1967, but the commission in Decision No. 70094 entered September 15, 1967, suspended the effective date of such proposed deletion, instituted the instant investigatory proceeding, and conducted a hearing relative to such proposed deletion. The precise question before the commission in this proceeding is whether or not Mountain States Telephone should be permitted to delete the above-set-forth subsection F from the said tariff. The Federal Communications Commission has already permitted Mountain States Telephone to delete such paragraph from its interstate tariff.

8. In said Advice Letter No. 435, Mountain States Telephone stated the reason for such deletion to be:

"Since the fact that whether or not a CATV company has complied with local ordinances and has subsequently

been granted permission to provide CATV service is a matter of public notice, such a regulation is redundant."

We agree with the determination that subsection F is redundant, but not with the reasoning advanced in support of such determination. Subsection F is simply a particularized restatement of the general law that it is the responsibility of all persons to comply with applicable law. The responsibility of a CATV system operator to comply with applicable law cannot be altered or changed in any way by a regulation in the tariff of a public utility. Subsection F is therefore redundant, as the responsibility of a CATV system operator to comply with applicable law remains the same whether subsection F is in the tariff or not. It is not the obligation or responsibility of Mountain States Telephone to see that a CATV system operator complies with applicable law. This is the normal function of law enforcement agencies. For example, it is neither the function nor responsibility of a motor vehicle common carrier delivering goods to a retail merchant to determine whether or not such merchant is properly licensed by municipal and state authorities. If subsection F should be erroneously and improperly interpreted in such manner as to require Mountain States Telephone to assume the responsibility for determining, interpreting, and enforcing applicable law, then such subsection F would not only be ambiguous, but would also be an improper tariff provision. Order provisions to follow will authorize the deletion of said subsection F from Mountain States Telephone tariff Colorado PUC No. 5, and the tariff as so amended will be just, reasonable, and nondiscriminatory.

Discussion

[1] In view of the great interest evidenced in this proposed tariff change by the municipalities of the state of Colorado, as well as CATV system operators, the commission deems it proper to discuss in somewhat more detail cer-

tain of the problems involved in the rendition of CATV service, even though such problems are not particularly relevant as to our decision in the instant proceeding.

At the outset, CATV system operators have a major problem in that such operators, in effect, are reselling the product of the direct television broadcasting stations. Much of the material broadcasted by such direct television broadcasting stations is copyrighted. It is an interesting legal question as to whether CATV system operators are violating the copyright laws by the redistribution for profit of copyrighted direct television broadcasting material without the permission of the copyright owner. Cases raising this issue are now pending before the Supreme Court of the United States, with oral arguments probably to take place in March or April of this year. Such problem has also been brought to the attention of the Congress of the United States, and it is possible that Congress may consider the enactment of legislation concerning such issue. Of course, the issue of such potential liability is primarily a problem of the CATV system operator. We point out, however, that if the controversial subsection F should be improperly interpreted to require Mountain States Telephone to assume the responsibility for determining, interpreting, and enforcing a local municipal ordinance relating to CATV service, such subsection F could logically also be misinterpreted to require Mountain States Telephone to assume the responsibility for determining, interpreting, and enforcing the copyright laws. Again this is the responsibility and function of our law enforcement agencies. To draw a further parallel, it is not the function or responsibility of a motor vehicle common carrier to determine the legal ownership of goods tendered to it for transportation.

[2-4] We turn now to the problems of a new potential CATV system operator. Assume with us that this operator has made the necessary studies and has determined that it

will be financially profitable to render CATV service to the inhabitants of anytown in the state of Colorado. Such operator has determined where his master antenna system will be located, and is now considering how to provide the necessary coaxial cable distribution system. He has three choices available to him, i. e.: (1) He may construct his own distribution system, either installing the coaxial cable underground, or attaching the coaxial cable to an aboveground pole system which he would construct; (2) he may enter into a pole attachment agreement with existing public utilities rendering utility service in anytown, pay rental to such public utilities for the use of the existing utility pole system, and attach his coaxial cable distribution system to such existing utility pole system; (3) he may use the channel service for use in community antenna television systems provided as a public utility service by Mountain States Telephone under its applicable tariffs, interstate and intrastate (Colorado PUC No. 5).

All three of these choices involve the use of the streets, alleys, and perhaps utility easements of anytown. Therefore, if the CATV system operator elects to proceed under either Option 1 or Option 2, such operator must obtain permission from anytown to use its streets, alleys, and utility easements to install therein or thereon the required coaxial cable distribution system. A legal question probably exists as to whether the permission granted by anytown should be in the form of a franchise or a license-permit. If a franchise is required, then if anytown is a home-rule city, the question may have to be submitted to a vote of the people. In either event the amount of the franchise tax or license-permit fee must be determined, apparently normally by negotiations with the officials of anytown. A further problem exists as to Option No. 2, in that in addition to obtaining permission from anytown to use its streets, alleys, and utility easements, the CATV system operator must negotiate a pole attachment agreement with existing public utilities which would

permit the said operator to attach his coaxial cable to the existing utility pole system. The Colorado Public Utilities Commission has not, in the past, considered pole attachment agreements to be a utility service. Therefore, existing public utilities are free to enter into such agreement, or not, as they may elect. Option No. 3 would involve the use of Mountain States Telephone's channel service. For reasons that were not made completely clear in the instant proceeding, CATV system operators apparently do not desire to utilize such service of Mountain States Telephone. One of such operators testified that the service rendered by Mountain States Telephone was not as good as it should be, and the tariff charges were too high. In passing, we point out that the Colorado Public Utilities Commission, on complaint filed, has full jurisdiction to investigate the matter of service and rates, and take the necessary action to insure the rendition of proper service at just and reasonable rates. It would appear that if Option No. 3 were utilized by a CATV system operator, it would not be necessary to obtain permission from anytown to use its streets, alleys, and utility easements, as Mountain States Telephone, in the rendition of service as a communications public utility, already has authority to use such streets, alleys, and public utility easements.

It is interesting to note the position of the three CATV system operators who testified before the commission in the instant proceeding. None of them wanted to use the public utility service offered by Mountain States Telephone to CATV system operators. In effect, they simply wished to prevent any other CATV system operator from utilizing such service and entering into competition with existing CATV system operators. Apparently such operators desire to have the same territorial protection afforded to fixed public utilities without the accompanying public regulation of rates and service. The commission, although recognizing the force of such economic motivation, entertains little sympathy for the position of its industry advocates.

[5] The position of the municipalities of the state of Colorado is somewhat different — although such position is also based on an economic motivation. The municipalities of the state of Colorado appear to be faced with the problem of increased public demands for municipal services, both from a quantity and quality standpoint. Such demands can be met only by increased revenues. The primary sources for tax revenues are (1) property tax, (2) sales tax, (3) income tax, and (4) miscellaneous (sometimes referred to as nuisance) taxes. Many municipalities already have a relatively high property tax as well as a relatively high sales tax. Municipalities are not, under existing law, authorized to impose an income tax. As a result, municipalities in the state of Colorado have not only been raising their miscellaneous taxes in many areas, but have also been looking for new areas in which to levy taxes. With the advent of CATV, Colorado municipalities apparently recognized an opportunity to increase municipal revenues by levying a franchise tax or a permit license fee upon CATV system operators rendering CATV service within the corporate limits of their respective municipalities. Such a tax would in effect be a luxury tax, as free television would remain available to all television set owners who did not subscribe to the CATV service. The amount of the tax revenues payable to the municipality could be maximized by permitting only one CATV system operator to render service within the corporate limits of the municipality, and by allowing potential operators to bid against each other for the necessary municipal permission to render such service. The bidding, in effect, would relate to the amount of tax each CATV system operator would be willing to pay to the city for the privilege of rendering CATV service under a specified schedule of rates. The municipalities, of course, could, as a practical matter, control the rendition of CATV service under Options 1 or 2, because of their control over municipal streets, alleys, and utility easements. The municipalities, however, would have

little or no control over service rendered under Option No. 3. In other words, an unsuccessful CATV system operator bidder might still be able to render CATV service in the city under Option No. 3, and his ability to so do would effectively negate the attempt of the municipality to allow such service to be rendered only by the highest bidder. In the present proceeding, the municipalities, in effect, are requesting the Colorado Public Utilities Commission to exercise its regulatory authority to preclude Mountain States Telephone from rendering service to a CATV system operator under Option 3, unless such operator first obtains a franchise or license-permit from the municipality. Even though we are fully aware of the revenue problems of the municipalities of the state of Colorado, and sympathize with the municipal officials who are responsible for solving such problems, we would deem it a misuse of the regulatory authority conferred upon us by the Constitution of the state of Colorado and the General Assembly of the state of Colorado to so do. However, even if we were inclined to use the regulatory power of the commission for such purpose, any attempt on our part to so do would be relatively ineffectual, as the primary service rendered by a CATV system operator is interstate in character and rendered under an interstate tariff, not an intrastate tariff.

We turn now to discuss the position of Mountain States Telephone in the instant proceeding. This company is a public utility. It has a legal obligation to render service under its tariffs on file with the Colorado Public Utilities Commission. If such company improperly refuses to provide such service, it may be liable in damages. Under the existing tariff provision, i.e., subsection F, if Mountain States Telephone refused to render service under its channel tariff (Colorado PUC No. 5) because the CATV system operator did not have authority from the municipality, and it were later judicially determined that such authority was either

not necessary or improperly withheld by the municipality, there would then be a possibility that Mountain States Telephone would be liable in damages to said CATV system operator. Mountain States Telephone wishes to obviate such possibility by eliminating such provision from its tariff. Mountain States Telephone would then render service under such tariff to all service applicants. If the municipality were of the opinion that the CATV system operator in rendering CATV service was in violation of any municipal ordinance, it would then be incumbent upon the municipality to enforce such ordinance against the CATV system operator in the appropriate judicial forum. We see nothing wrong with such procedure. The judicial system of the state of Colorado is the proper forum to adjudicate such issues, not the Colorado Public Utilities Commission. Furthermore, we point out that in the long run all costs of doing business incurred by a public utility eventually are paid by the ratepayers of such utility as part of the rates charged by the utility. We see no reason for the telephone ratepayers in the state of Colorado to assume any potential liability by our requiring said subsection F to remain in the tariff of Mountain States Telephone.

The CATV system operators now rendering CATV service in the state of Colorado appear to have convinced the municipalities that CATV service should be monopolistic in nature. The argument advanced seems to be that a CATV system has basically the same characteristics as, for example, an electric system. In other words, it is necessary in order to provide CATV service to construct a system at great cost, and therefore a duplicating system would constitute considerable economic waste. On the surface, this argument appears to be tenable. We have grave doubts, however, as to whether the actual facts would support the theory. We have seen no figures comparing the fixed system cost per service subscriber of a CATV system with the fixed system

rough comparison of the necessary equipment, however, cost per customer of an electric, gas, or telephone utility. A would indicate to us that the fixed system cost per potential service subscriber of a CATV system would be far below the fixed system cost per customer of a gas, electric, or telephone utility. A further fact to be considered is that the product distributed by the CATV system operator is obtained by such operator at little or no cost, whereas natural gas or electric energy must be purchased or generated by the gas or electric utility. We readily admit that we have not performed the necessary cost studies to determine whether in truth or in fact the investment per service subscriber necessary on the part of a CATV system operator to render CATV service is so great as to economically justify the creation of a monopolistic system of distribution. On the incomplete facts known to us, we doubt it.

It would appear that the state of Colorado has two avenues open to it concerning the treatment of CATV service: The first avenue would be to simply treat the rendition of CATV service in the same manner as any other legitimate business enterprise. A municipality, of course, has the right to require any business enterprise to obtain a license. Such licenses normally issue as a matter of course upon payment of the required fee and compliance with routine conditions set forth in the applicable municipal ordinance, i.e., retail store licenses. The CATV system operator could then elect to proceed to construct the necessary system. If he elected to proceed under Options 1 or 2, he would have to arrange with the municipality to use its streets, alleys, and utility easements. If he elected to proceed under Option 3, he would obtain channel service from Mountain States Telephone. He would be competing with free television from direct television broadcasting stations. He would also be competing with any other CATV system operators who might elect to render service in the same geographical area.

The license issued to him by the municipality would be non-exclusive, and a similar license could be procured by any other qualified license applicant. The public would be protected from the payment of exorbitant rates, not only by the competition of free television, but also by the actual or potential competition of other CATV systems operators.

The other alternative would be to treat the rendition of CATV service in generally the same manner as a monopolistic fixed utility service. In this event, the CATV system operator would have a protected geographical area in which to render service. No other CATV system operator would be permitted to render CATV service in such area. It is obvious that this alternative implies and is conditioned upon the utilization of governmental power, state or municipal, to preclude the entry of competitors into the field. It should also be obvious that governmental power should not be utilized to confer a monopoly status on any business, unless at the same time such governmental power is utilized to control and regulate the rates, services, and rate of return of such business. Under existing law, it appears that the Colorado Public Utilities Commission has no jurisdiction to regulate in any way the rendition of CATV service by a CATV system operator. The Federal Communications Commission has disclaimed any intent to attempt to so regulate the rates charged or the service rendered by a CATV system operator, stating that such jurisdiction is, in effect, a function for local (state or municipal) government. It is extremely doubtful if the municipalities of the state of Colorado have such jurisdiction, despite their efforts to achieve some sort of rate regulation by, in effect, conditioning revocable licenses to utilize streets, alleys, and utility easements upon the retention of certain specified rate schedules. It seems clear that if the rendition of CATV services is to be treated as the rendition of a public utility service, then the legislature of the state of Colorado should be requested to pass the

required legislation placing the rendition of such service under proper regulation. We note that the Colorado Public Utilities Commission has not sought such jurisdiction. However, we would be most happy to co-operate with the municipalities of the state of Colorado in working out possible solutions to the problems, and submitting such possible solutions to the legislature for the consideration of such body.

ORDER

The commission *orders:* That the proposed change in the Mountain States Telephone and Telegraph Company Colorado PUC Tariff No. 5, channel service for use in community antenna television systems (CATV), by the deletion from its existing tariff of subsection F, § II, which reads:

"F. *Obligation of Customer*

The customer shall be responsible for obtaining any authority to provide CATV service to its patrons that may be required by law or local ordinance," should be, and hereby is, permitted to become effective as set forth herein.

That the effective date of First Revised Sheet No. 6, channel service for use in community antenna television (CATV) systems tariff (Colo PUC No. 5), shall be the effective date of the order herein. That this order shall become effective twenty-one days from date hereof, and as of such date, the suspension of said tariff shall be, and hereby is, lifted, and Investigation and Suspension Docket No. 595 shall be closed.

ZARLENGO, Chairman, concurring: I concur in the order in toto.

The issue before the commission is: Should the commission authorize and order deletion of that part of the telephone company's filed tariff, to wit:

"F. *Obligation of Customer*

The customer shall be responsible for obtaining any authority to provide CATV service to its patrons that may be required by law or local ordinance."

Many contentions and arguments have been voiced for and against retention of such provision.

The provision could be construed to be a notice and statement of the company's position as to *whose* is the responsibility for obtaining authority required by law or local ordinance, if any, for a CATV operator to render service to patrons. It is an attempt to make it clear that it is the *customer's* (the CATV operator) responsibility to obtain proper local authorization to render CATV service and that it is not the *company's* responsibility. As such it constitutes an effort at clarification of responsibility to avoid misunderstanding and, as such, while it may be useful it is not a necessary part of the tariff.

If the provision is construed to be the imposition of a condition precedent to rendering service to the CATV operator that the CATV operator must first obtain any authority which may be required by law or local ordinance to render CATV service to its patrons it is illegal. The company, as a public utility, must serve, and it cannot within the framework and purview of the laws relating to regulation of public utilities, refuse its service upon such grounds. It does not have powers to enforce local law or ordinances, nor can it arrogate unto itself such powers by filing a tariff and by exercise of the coercive action of withholding its public utility services. The matter of compliance with local law and ordinance is a matter resting between the CATV operator and the local authorities. The local authorities may seek by law to impose such a right and duty upon the company. However, as to the legality of such law no opinion is hereby ventured.

The commission is not called upon to determine whether or not it has jurisdiction over the rendering of CATV service. The commission is not called upon to determine whether or not the referred-to pole attachment service is subject to its jurisdiction. Therefore, no opinion is hereby given as to such questions.

LIST OF PETITIONER'S AFFILIATED COMPANIES

As of December 12, 1980

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
	RESTRICTED SUBSIDIARIES		
I. TELE-COMMUNICATIONS, INC.	Delaware 8/20/68	Colorado, Utah	The Company
A. CENTRE VIDEO CORPORATION	Pennsylvania 4/14/52		100%
1. Allegheny Cablevision, Inc.	Pennsylvania 2/11/65		60%
2. Centre Video Corporation of Ohio, Inc.	Ohio 2/9/39		100%
3. Centre Video Corporation of West Virginia	West Virginia 10/8/64		100%
B. COMMUNITY TELE-COMMUNICATIONS, INC.	Nevada 1/13/64	Colorado, Idaho, Iowa, Kentucky, Montana, Nebraska, New Mexico, Ohio, So. Dakota, Tennessee, Texas, Utah, Wyoming, Oklahoma, Kansas, Missouri	100%
1. Alabama T.V. Cable, Inc.	Alabama 11/12/64		80%
a. Microwave Services, Inc.	Alabama 12/18/72		50%**
2. Cable T.V. of Durango, Inc.	Nevada 12/10/65	Colorado	100%
3. Centennial Communications Corporation	Delaware 8/22/77	Indiana	100%

4. Columbus Cablevision, Inc.	Georgia 1/14/65		100%
5. Community Communications Company	Colorado 5/19/66		100%
6. Community Realty, Inc.	Nevada 6/27/67	Arizona, California, Montana, Nebraska, Utah, Wyoming	100%
7. Community TCI of Colorado, Inc.	Colorado 4/11/74		100%
8. Community TCI of Kansas, Inc.	Kansas 4/17/67		100%
9. Community TCI of Ohio, Inc.	New Jersey 2/9/39	Ohio, West Virginia	100%
a. C & R Cable System, Inc.	Ohio		100%*
b. J.A.V. Enterprises, Inc.	Ohio		100%
c. Miami Valley Cable, Inc.	Ohio 8/31/73		100%
d. New Castle Cable Communications, Inc.	Indiana 12/17/70		80%
e. Wheeling Antenna Company, Inc.	West Virginia	Ohio	100%*
i. Brooke Cable Co.	West Virginia		100%*
ii. Wellsburg Cable Co.	West Virginia		100%*
10. Community Television of Utah, Inc.	Nevada 2/7/66	Utah	100%
11. Com-West, Inc.	Delaware 11/15/71	Oklahoma, Minnesota	100%
a. Cable View of Albert Lea, Inc.	Minnesota 11/15/71		80%
b. Cablevision of Austin	A Minnesota Joint Venture		80%

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
12. CTCI Cablevision, Inc.	Delaware 11/19/68	California	100%
a. Peninsula T.V. Power, Inc.	California 8/2/68		100%
b. Poughkeepsie Cablevision, Inc.	New York 12/6/67		100%
c. Pueblo T.V. Power, Inc.	Colorado 9/1/66		100%
d. T.V. Power of North County, Inc.	California 2/9/68		100%
13. Dodge City CATV, Inc.	Kansas 1/30/67		100%
14. Fredonia Cable TV, Inc.	Kansas 2/28/68		100%
15. Fulton Community Antenna Television Systems, Inc.	Illinois 10/26/71		80%
16. Kauai Cablevision, Inc.	Hawaii 7/25/80		100%
17. Nation Wide Cablevision, Inc.	Delaware 12/16/68		100%
a. Nation Wide Cablevision, Inc.	California 2/15/66	Washington	100%
i. Peninsula Cable Television Corporation of Menlo Park	California 4/14/69		100%
iii. Port Arthur Cablevision, Inc.	Texas 2/3/69		100%
18. Richland Cable Systems, Inc.	Wisconsin 9/6/78		100%

19. Sierra Communication Systems, Inc.	California		80%
20. TCI Cablevision, Inc	Nevada 10/31/77	Colorado, Florida, Missouri, South Carolina	100%
21. TCI Pacifica Corp.	Delaware 7/28/72	California	100%
a. Brisbane Cable T.V., Inc.	California 8/11/69		84%
b. Crystal-Brite Television, Inc.	California 12/5/66		80%
c. Fremont Cable T.V., Inc.	California 12/5/66		90%
d. Vista Grande Cablevision, Inc.	California 7/17/68		84%
22. TV Pix, Inc.	Nevada 4/16/56	California	100%
23. Twenty CATV, Inc.	Georgia 10/8/69		87%
24. Utah Satellite Company	Delaware	Utah	100%
C. WESTERN TELE-COMMUNICATIONS, INC.	Nevada 9/13/65	Arizona, California, Colorado, Idaho, Montana, North Dakota, Oregon, Tennessee, Utah, Washington, Wyoming, Nebraska, Kansas, South Dakota, New Mexico	100%
1. American Television Relay, Inc.	Arizona 10/14/54	California, New Mexico, Texas	100%
2. General Communication, Inc.	Alaska 5/16/79		100%*
3. Western Satellite, Inc.	Nevada 11/30/79	Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Oregon, Utah, Washington, Wyoming	100%

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
	UNRESTRICTED SUBSIDIARIES		
D. TCI DEVELOPMENT CORPORATION	Colorado 11/28/69	Arkansas, Georgia	100%
1. All Channel T.V., Inc.	Wisconsin 9/10/65		33⅓%**
a. Complete Channel T.V., Inc.	Wisconsin 9/3/65		100%
2. Brookside Antenna Company, Inc.	Ohio		100%
3. Columbia Communications Associates	A Texas Joint Venture		50%**
4. Community Cable of Louisiana, Inc.	Louisiana 5/19/80		100%
a. New Orleans Tele-Communications	Louisiana Joint Venture		50%**
5. Community Tele-Communications of South Dakota, Inc.	Colorado 7/29/77	South Dakota	100%
a. Sioux Falls Cable Television	A South Dakota Partnership		80%**
6. Cornhusker Cablevision, Inc.	Nebraska 5/5/80		100%
7. Hillcrest Cablevision, Inc.	Ohio 7/27/79		50%**
8. Home Theatres, Inc.	Arkansas		3.62%**
9. Memphis CATV, Inc.	Tennessee 12/30/65		44.5%**

10.	Peninsula Cable Television Corporation of San Mateo	California 8/29/69		86%
11.	Springfield Tele-Communications Company, Inc.	Colorado 5/28/80	Massachusetts	100%
12.	TCI Colorado Corporation	Colorado 3/7/80		100%
13.	TCID of Texas, Inc.	Texas 12/29/79		100%
14.	Tele-Matrix Corporation	Nevada 11/13/79		50%**
15.	TCI Programs, Inc.	Delaware 5/22/70	Colorado	100%
	a. Black Entertainment Television, Inc.	Dist. of Columbia	..	10%**
	b. Cable Network Television, Inc.	Nevada 7/1/65	Colorado	100%
	c. National Telefilm Associates, Inc.	New York 8/21/52	California	77.46%
	d. TCI Cable Theatre, Inc.	Nebraska 9/4/73	Ohio	100%
16.	Tri-State Cablevision, Inc.	Ohio 11/27/78		100%
17.	Vail Cable Communications, Inc.	Colorado		15%**

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
E. TCID 2, INC.	Nevada 11/28/80		100%
1. Athena Communications Corporation	Delaware 12/28/78	New York, Mississippi, Colorado	74.2%
a. Athena Cablevision Corporation	Delaware 12/28/71	Colorado, California, Florida	100%
i. Athena Cablevision of Tennessee and Kentucky, Inc.	Tennessee 9/28/79	Indiana, Kentucky	100%
a. Tennessee and Kentucky Cable TV Company	A Tennessee Partnership 9/28/79		50%
a.i. Blount County Cable TV Company LTD.	A Tennessee Limited Partnership		50%
ii. Celebration Cablevision Corporation	Tennessee 3/16/77		100%
iii. Halifax Cable TV, Inc.	Florida 1/14/64		99%
a. Halifax Cablevision, Inc.	Florida 8/5/63		100%
a.i. Volusia Cable-Vision Corp.	Florida 10/11/63		100%

b. Athena Development Corporation	Delaware 7/17/73	100%
i. Athena Cablevision of Corpus Christi, Inc.	Texas 2/26/73	100%
ii. Athena Cablevision Corporation of Knoxville	Tennessee 4/11/74	100%
iii. International Telemeter Corporation	New York 7/21/64	100%
iv. Schenectady Cablevision, Inc.	New York 10/22/77	87%
c. Black Entertainment Television, Inc.	District of Columbia	10%**
d. Texcom, Inc.	Texas 4/17/79	99%
e. Torrence Communications, Inc.	Mississippi 1/10/80	80%
i. Rankin County Cablevision Company	Mississippi 8/3/76	100%

Name	Jurisdiction and Date Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
F. TCID 3, INC.	Nevada		100%
1. Tele-Communications Investments, Inc.	Colorado 11/29/76	Illinois, New Jersey, North Carolina	50%**
a. Cable Communications Equities, Inc.	Nevada 5/14/80	South Dakota, Minnesota, Washington	100%
b. Cable Investments, Inc.	Delaware 10/1/64		100%
i. Cable T.V. of Minot, Inc.	North Dakota 5/14/71		100%
a. Minot Cable Systems	A North Dakota Partnership		2%**
ii. Brazoria Cablevision, Inc.	Texas 12/18/70		100%
a. Brazoria Cablevision Associates	A Texas Partnership		100%
b. Standard Communications Associates, Inc.	Delaware 8/23/72	Texas	100%
iii. CATV of Elizabeth, Inc.	New Jersey 5/3/68		80%
iv. G-F Cable T.V., Inc.	North Dakota 3/24/65	Minnesota	100%
v. Glendive Cable T.V., Inc.	Montana 4/1/65		50%**
vi. Keystone Communicable, Inc.	Pennsylvania 6/6/75		100%

vii. Madison Communications, Inc.	Delaware 3/8/74		100%
a. Island Cable Company	New Jersey 9/22/75		100%
b. Madison Cablevision, Inc.	Delaware 7/24/74	Maryland, North Carolina, South Carolina, Virginia, Vermont	100%
c. St. Albans Cablevision, Inc.	Delaware 8/6/74		100%
viii. Minot Cable System	A North Dakota Partnership		98%
ix. Satellite Services, Inc.	Delaware 8/16/77		100%
x. Upper Valley Telecable Company, Inc.	Idaho 10/31/78		25%**
c. Communications Investments, Inc.	Colorado 12/26/78		100%
d. Creative Films, Inc.	Colorado 2/1/80		100%
e. Mahoning Valley Cablevision, Inc.	Ohio 9/19/80		100%

Name	Jurisdiction Of Incorporation	Jurisdiction In Which Qualified As A Foreign Corporation	Percentage Of Stock Ownership By Parent Company And Subsidiaries
	MANAGED COMPANIES		
I. Crest Communications, Inc.	Kansas 3/15/77		***
1. Cape Girardeau Cable TV	A Missouri Partnership		
2. Jackson Cable TV	A Missouri Partnership		
3. Newton Cable TV, Inc.	Kansas 4/21/76		100%
4. Satellite Communications Services, Inc.	Kansas 1/25/77		100%
II. Burke County Cable Television, Inc.	Georgia		***
III. Saline County Cable Television, Inc.	Arkansas		***

*An Unrestricted Subsidiary — stock held by a Restricted Subsidiary for investment purposes only.

**For informational purposes only, not a subsidiary as defined by majority ownership.

***Not an affiliated corporation, CATV systems subject to Management Agreement.